Petition

Office-Supr. Ct., U.S.
F I L E D
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

81-221

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,

Petitioner,

vs.

JOE VERNON SEARS, an individual, in person and for all other persons similarly situated, ALBERT L. BENNETT, C. J. SKELTON, ARCHIE N. JONES, FOREST D. TOLLETT, JOHN W. LANDRUM, LAWSON C. SPENCER, THOMAS H. WHITE, EARLIE NASH, AUBREY A. ROBINSON, EDWARD RAWLINS, JOHN W. COLE, CHARLES MAJORS, JR., JESSE J. SMITH, PAUL H. STEWART, JIMMY E. BROWN, CARL E. CHESTER, RAY E. LANDRUM, RAYMOND WILLEY, ELGIE CROW and ELLIS JOHNSON, CRISCEL KEMP, A. M. BENNETT, A. L. WOOLFOLK, T. C. LUCKEY, W. W. SEYMOUR, THE BROTHERHOOD OF SLEEPING CAR PORTERS, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM SITZER
J. DENNIS O'LEARY
OF COUNSEL DUBAIL, JUDGE,
KILKER, O'LEARY & SMITH
One Mercantile Center, Suite 3210
St. Louis, Missouri 63101
(314) 241-4261
Attorneys for Petitioner

July 28, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether a railroad craft labor union, which maintained and enforced historic jurisdictional and seniority rights under its collective bargaining obligations to its craft members, can be liable to non-craft employees under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(c), solely by reason of such activities, for the failure of train porters to be hired or promoted to positions as brakemen, where the employer had and exercised sole authority to hire and promote.

2. Whether the railroad craft seniority system here involved, which is almost one hundred years old, which has existed since the early days of railroading in the United States, and which existed *prior* to the formation of the train porter craft (the class of Plaintiffs here involved) is "bona fide" and exempt under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-2(h) as measured by the guidelines of this court in *Teamster* v. *United States,* 431 US 324 (1977) and presently under review by this court in *Swint* v. *Pullman-Standard,* 624 F.2d 525 (5th Cir. 1980), *cert. granted,* April 20, 1981, 49 U.S.L.W. 3788.

INDEX

	Page
Questions presented	i
Prayer	1
Opinions below	2
Jurisdiction	2
Statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	8
1. The decision below raises significant and recurring questions concerning the liability of a labor union under the provisions of Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-2(c) and which conflicts with an applicable decision of another circuit court of appeals	8
2. The decision below had decided important questions of Federal Law in a way which conflicts with the applicable decisions of this court as to the proper interpretation of 42 U.S.C. Section 2000e-(h)	13
Conclusion	16
Appendix A-Opinions of the Court of Appeals	A-1
Appendix B-Opinions of the District Court	A-28

CITATIONS

Cases:

Conley v. Gibson, 355 U.S. 41 (1957) 16

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 8

Hunter v. Atchison, Topeka & Santa Fe Railway, 188 F.2d 294 (7th Cir. 1951) 5

International Association of Machinists v. Central Airlines, 372 U.S. 682 (1963) 10

Lewis v. Tobacco Workers' International Union, 577 F.2d 1135 (4th Cir. 1978) 12,13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11,12

Northwest Airlines v. Transport Workers' Union of America, 67 L.Ed. 2d 750 (1981) 9

Order of Railway Conductors v. National Mediation Board, 113 F.2d 531 (D.C. Cir. 1940) 13

Pennsylvania Railroad Company v. Rychlik, 352 U.S. 480 (1957) 13

Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980), *cert granted,* 49 U.S.L.W. 3788 (1981) i,14

System Federation v. Wright, 364 U.S. 642 (1961) 6

Teamsters v. United States, 431 U.S. 324 (1977) i,6,14

Texas Department of Community Affairs v. Burdine, 67 L.Ed 2d 207 (1981) 11,12

UTU v. Penn Central Railroad Co., 443 F.2d 131 (6th Cir. 1971) 15

Statutes:

28 U.S.C. Section 1254(1) 2

42 U.S.C. Section 2000e 3

42 U.S.C. Section 2000e-2(c) i,2,7,8,9,10,11

42 U.S.C. Section 2000e-2(h) i,3,6,13,14

45 U.S.C. §151 et seq. 6

Miscellaneous:

46 Yale Law Review 567 (1937) 13

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,

Petitioner,

vs.

JOE VERNON SEARS, an individual, in person and for all other persons similarly situated, ALBERT L. BENNETT, C. J. SKELTON, ARCHIE N. JONES, FOREST D. TOLLETT, JOHN W. LANDRUM, LAWSON C. SPENCER, THOMAS H. WHITE, EARLIE NASH, AUBREY A. ROBINSON, EDWARD RAWLINS, JOHN W. COLE, CHARLES MAJORS, JR., JESSE J. SMITH, PAUL H. STEWART, JIMMY E. BROWN, CARL E. CHESTER, RAY E. LANDRUM, RAYMOND WILLEY, ELGIE CROW and ELLIS JOHNSON, CRISCEL KEMP, A. M. BENNETT, A. L. WOOLFOLK, T. C. LUCKEY, W. W. SEYMOUR, THE BROTHERHOOD OF SLEEPING CAR PORTERS, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, United Transportation Union, as successor to the Brotherhood of Railroad Trainmen, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Tenth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals is reported at 645 F.2d 1365 and appears in Appendix A hereto. The opinion of the district court for the District of Kansas on the issue of liability is reported at 454 F.Supp. 158. The separate opinion, on damages, of the district court, was not reported. Both district court opinions appear in Appendix B hereto.

JURISDICTION

The judgment of the court of appeals of the Tenth Circuit was entered on March 11, 1981. A timely petition for rehearing in banc was denied May 11, 1981, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

Section 2000e-2(c)

It shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 2000e-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206 (d) of Title 29.

STATEMENT OF THE CASE

This is a class action brought in 1972 by Joe Vernon Sears as a train porter, employed by Atchison, Topeka & Santa Fe Railway Company (hereinafter "Santa Fe"), against Santa Fe and the United Transportation Union (hereinafter "UTU") charging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e). UTU is the successor by merger effective January 1, 1969, to Brotherhood of Railroad Trainmen (BRT), which represented brakemen, and Order of Railway

Conductors and Brakemen (ORC & B), which represented conductors. (R. Vol. 2, Stip. 3). Whenever applicable, UTU herein will be used to include also it predecessors, BRT and ORC & B. The union representing the train porters' craft on the Santa Fe, the Brotherhood of Sleeping Car porters (hereinafter "BSCP"), was subsequently joined as a party plaintiff (R. Vol. 2 Stip. 4 and 13). The Equal Opportunity Commission filed an amicus brief in the Court of Appeals.

The action was certified as a class action under Rule 23(b)(2) Federal Rules of Civil Procedure. Plaintiff Joe Vernon Sears was named as class representative on behalf of himself and a class comprised of all black train porters who had been employed by Santa Fe during the period beginning July 2, 1965, and who have been employed at any time as a train porter (R. Vol. 2, Stip. 9). Prior to trial, Santa Fe compromised claims against it for back pay and attorneys' fees and remained as a party for purposes of seniority and injunctive relief only (R.Vol. 2, Stip 5). All issues of liability were submitted to the trial court on stipulation of facts and exhibits subject to objections of relevancy and materiality.

The hiring and promoting of all employees has always been a retained right of Santa Fe, and all such authority was exercised exclusively by Santa Fe. UTU never had nor exercised any hiring or transfer authority. (R. Vol. 2, Stip. 29). At no time has membership in the UTU or any other labor union been a condition prior to employment for any person of any race for hire or promotion by Santa Fe into any craft.

UTU and its predecessors have represented the crafts of brakemen and conductors on Santa Fe since at least 1892, when the first collective bargaining agreement was entered into for those crafts (R. Vol. 2, Stip. 30). The agreement contained seniority provisions. So far as is known, except for the Silsbee District in South Texas, all brakemen and conductors hired by Santa Fe were white until after 1965. The craft of train porters was created by Santa Fe in 1899, when the first train porters

were hired (R. Vol. 2, Stip. 17). So far as is known, all train porters have been black.

The National Mediation Board, an independent agency of the executive branch of the Federal government, was established by the Railway Labor Act and the National Railroad Adjustment Board to recognize various crafts on the nation's railroads. BRT was certified to represent brakemen in 1926.

In 1942, the National Railroad Adjustment Board handed down an award that the head-end passeng aking work, being performed by train porters, properly bel d to brakemen. Ensuing litigation[1] set this award aside and ultimately remanded the controversy to the National Railroad Adjustment Board for reconsideration with the participation of train porters. In 1959, the Board issued award number 19324, again sustaining the claim of brakemen to perform braking work, but in equity permitted train porters with a seniority date of April, 1942 or earlier to retain their seniority and passenger braking rights (R. Vol. 2, Stip. 39). The Board returned those train porters with later seniority to positions as chair car attendants. In this case, the district court found liability and awarded relief only to train porters with a seniority date of April 1, 1942 or earlier; the court of appeals awards relief to all train porters.

On February 7, 1965, certain unions (not including either UTU or BSCP) entered into an agreement with the railroads, including Santa Fe, providing protection to the employees covered therein (February 7 agreement). The protection included guaranteed income but prohibited the carriers from transferring covered employees into other employment. In 1966, BSCP and Santa Fe extended this agreement to include train porters and chair car attendants (R. Vol. 2, Stip. 41). UTU was not a party to this agreement. 454 F. Supp. at 181. This was a benefit never enjoyed by brakemen.

---

[1] *Hunter* v. *Atchison, Topeka & Santa Fe Railway*, 188 F. 2d 294 (7th Cir. 1951).

With passenger traffic declining, some chair car attendants applied for employment in other crafts, including switchmen and brakemen. They offered to surrender their February 7 protection and former seniority to accept this opportunity. BSCP had formerly objected but subsequent negotiations resulted in an agreement in 1971 permitting chair car attendants to accept other employment and still retain their status as protected employees and their chair car attendant seniority. A number of chair car attendants availed themselves of this agreement (R. Vol. 8, Exhibits D-4, 5, and 6). The last train porter was hired by Santa Fe in 1956, nine years before the effective date of Title VII (Stip. 38, R.Vol. 2).

Prior to 1951, the Railway Labor Act 45 U.S.C. §151 et seq. prohibited the union shop or any agreement requiring or prohibiting union membership as a condition of employment. *System Federation* v. *Wright,* 364 U.S. 642, 646 (1961). The significance of this is that UTU was impotent to affect hiring and promoting practices. The first union shop agreements covering brakemen and conductors on the Santa Fe were entered into in 1965 and 1966 respectively (R. Vol. 2, Stip. 29). Even after union shops came into being, eligibility for employment as a brakeman did not depend on union membership; UTU could not "cause or attempt to cause" the hiring or promoting of any person of any race into any position of employment.

In its decision on liability, the district court holds that the craft seniority system was neutral and rational, but that it had its genesis in racial discrimination and was created and maintained with an illegal purpose. The court below finds the craft seniority system not bona fide within the meaning of Section 703(h) of Title VII, 42 U.S.C. Section 2000(e)-2(h), under the guidelines provided in *Teamsters* v. *United States,* 431 U.S. 324 (1977). The district court finds that the UTU has no liability for post act discrimination because it neither had nor exercised any hiring or promoting authority and, therefore, did not engage in

any employment conduct which affected plaintiffs. 454 F.Supp. at 182. Yet UTU is found equally responsible with Santa Fe on a disparate impact theory because its "role in creating, maintaining, and otherwise ratifying the seniority systems was at least as great as Santa Fe's role . . . ". 454 F. Supp. at 180. This basic finding is affirmed by the Tenth Circuit Court of Appeals. 645 F.2d at 1374-77. The finding of liability against UTU is under 42 U.S.C. §2000e-(c)(3), not §2000e-(c)(1) or (2). Id.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant And Recurring Questions Concerning The Liability Of A Labor Union Under The Provisions Of Title VII Of The Civil Rights Act, 42 U.S.C. Section 2000e-2(c) And Which Conflicts With An Applicable Decision Of Another Circuit Court Of Appeals.

An examination of the record in this case shows that the UTU was simply performing its duties of representation to all members of the crafts it represents in a nondiscriminatory manner. The decision below penalizes the UTU for carrying out its duties. The court below states, 645 F.2d at 1376:

> "If the craft distinction between porters and brakemen is ignored as invalid, the union has a duty not to use its power to discriminate against non-union or minority members of the craft."

Yet the court concedes at page 1369 that the Santa Fe acted alone in creating the train porter craft in 1899, a good seven years after the seniority system here under attack was created. And the court further concedes that the union had no power in the areas of hiring and promoting. Rather, the court states that the UTU's role as a party to a collective bargaining agreement is sufficient to impose liability. This analysis ignores the lack of legal causation between the union's actions and the alleged discriminatory effects of hiring and promoting. Apropos is *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758 (1976) where this court states:

> "The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system."

A recially discriminatory hiring system could not expose UTU to liability where it concededly had nothing to do with hiring. At no time was eligibility for employment dependent on union membership. Further, anyone hired, white or black, union

member or not a union member, was entitled to all the economic protection of the seniority system.

42 U.S.C. §2000e-2(c)(3) states that it shall be an unlawful employment practice for a labor organization "to cause or attempt to cause an employer to discriminate". In reliance upon what it conceived to be the principles established by this statute, the Tenth Circuit has held here that the UTU discriminated by virtue or negotiating collective bargaining agreements with a seniority system that had an adverse impact because of race. 645 F.2d at 1375. In so ruling, the court has so seriously and significantly departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision for reasons herein explained. Further the decision below deals with the construction of 42 U.S.C. Section 2000e-2(c); this court has not had occasion to address itself specifically to the construction of this section, which raises constantly recurring questions whenever a race discrimination suit involves a labor organization as well as an employer.[2] Both litigants and lower courts urgently need the assistance of this court in understanding the perimeters of liability of labor organizations vis a vis employers under the provisions of Title VII.

The parties to this case stipulated, and the trial court found, that the UTU neither had not exercised any right with respect to hiring or promoting of any person of any race of any craft; rather, all such authority was retained and exercised by Santa Fe alone. The record does not show that the union was consulted regarding hiring or promoting practices. The union did not participate, nor was it permitted or authorized to to participate,

---

[2] The relationship of labor unions and employers in a Title VII context on the issue of contribution has recently been considered by this court in *Northwest Airlines Inc.*, v. *Transport Workers Union of America*, 67 L. Ed. 2d 750 (1981).

with these management decisions. Nevertheless, the UTU is found liable by the court below for causing or attempting to cause unlawful employment practices by Santa Fe in the hiring and promoting of plaintiffs and members of the class into the brakemen's craft. This court should take the opportunity to determine whether a craft union which had nothing to do with hiring or promoting of employees can be held liable for causing or attempting to cause race discrimination in the hiring and promoting of employees under the provisions of Title VII generally and 42 U.S.C. Section 2000e-2(c)(3) in particular merely by negotiating and enforcing a seniority system. This is not a case of a union influencing an employer to discriminate, and the record so shows.

A. The Craft Jurisdictional Dispute

The court below addresses the validity of Award No. 19324 of the National Railroad Adjustment Board, decided October 15, 1959.[3] This was a jurisdictional dispute between the train porter and brakemen crafts, and it was determined by the administrative board of competent authority that certain train porters could perform front-end braking as part of their duties and others could not. Contrary to any acceptable legal precedent and contrary to all authority, the decision below reverses this administrative finding after it stood for more than twenty years, and finds that the UTU was guilty of race discrimination for litigating the jurisdictional dispute in the first place. The Tenth Circuit states at page 1375: "The net effect of UTU's actions was that it gained control of most braking work and that it allocated the work to its white members only." The decision below finds the UTU liable for race discrimination for presenting a jurisdictional dispute to the National Railroad Adjustment Board; there is absolutely no basis for such a finding. The UTU

---

[3] The award of the Board has the same legal effect as a judgment of a court. *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682 (1963).

was under an obligation to protect the seniority system of brakemen in this legitimate way. There has been a serious misconception of labor law principles by the court below. This departure from accepted judicial standards warrants an exercise of this court's power of supervision. The construction of the applicable provision of Title VII, 42 U.S.C. §2000e-2(c)(3), and the finding of a labor union liable for race discrimination under such circumstances, justifies the grant of certiorari to review the decision below.

B. The Appropriate Burden of Proof

On March 4, 1981, this court decided *Texas Department of Community Affairs* v. *Burdine,* 67 L.Ed. 2d 207 (1981). The decision below was handed down on March 11, 1981, just one week later, and does not consider *Burdine. Burdine* is an important decision, offering clarification to *McDonnel Douglas Corp.* v. *Green.* 411 U.S. 792 (1973). Specifically, it deals with the order of presentation of proof and the burdens of proof of the respective parties in a Title VII case.

This court holds in *Burdine* that when a Plaintiff has proved a prima facie case of employment discrimination, the Defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. The court restates the order of presentation of proof in a Title VII case. First, the Plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Secondly, if this Plaintiff succeeds in proving a prima facie case, the burden shifts to the Defendant to articulate some legitimate, nondiscriminatory reason for its action. Finally, should the Defendant carry this burden, the Plaintiff must then have an opportunity to prove that the reasons offered by the Defendant were not true but rather a pretext for discrimination. *McDonnell Douglas, supra.*

In this case, the court below found that the Plaintiffs had established their prima facie case of discrimination. However,

the UTU completely rebutted and proved that beyond any doubt legitimate, non-discriminatory reasons for its conduct, which were found to be true and not a pretext for discrimination.

The court below states that the porter and chaircar attendant crafts were drawn along racial lines. These crafts were formed by the Santa Fe without UTU involvement. The UTU rebutted the prima facie case of discrimination by showing that it and its predecessors simply acted to insure that braking duties were performed by its members. The fact that this operated to the advantage or disadvantage of any particular racial group is simply fortuitous. As already stated, the UTU was properly representing its members by taking a jurisdictional dispute to the National Railroad Adjustment Board. This was the UTU's obligation.

For the foregoing reasons, the court below has placed a different burden of proof on a labor union to rebut a prima facie case of discrimination, and decided this case in a way was in conflict with *Burdine* and *McDonnell Douglas, supra.*[4] The court below construes the provisions of 42 U.S.C. Section 20003-2(c) in a way which warrants the review of this court.

C. The Conflict of the Circuits

Finally, the decision below is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit, *Lewis* v. *Tobacco Workers' International Union,* 577 F.2d 1135 (4th Cir. 1978). In *Lewis*, the district court had found the union jointly responsible with the company, the reasons being that the union had a "checkered past" with segregated locals prior to 1963 and that it had "facilitated the company's tradition of segregated departments". The court of appeals reversed

---

[4] This court may find it appropriate to reverse and remand this case for reconsideration in light of *Burdine.*

"because the unions had nothing to do with hiring" and ordered the complaint dismissed as to the union. Id. at 1144-45. In this case there is a specific finding that the union had nothing to do with hiring but nevertheless was liable for causing or attempting to cause race discrimination in hiring. Therefore, there is a serious conflict of the circuits on the question of union liability in Title VII cases where the union has no authority in hiring and promoting.

Accordingly, this court should grant this petition for writ of certiorari to review these important federal questions.

2. The Decision Below Has Decided Important Questions Of Federal Law In A Way Which Conflicts With The Applicable Decisions Of This Court As To The Proper Interpretation Of 42 U.S.C. Section 2000e-(h).

The decision of the Tenth Circuit Court of Appeals in this case addresses significant, recurring, and important statutory policy considerations with respect to the bona fides of a seniority system which should be reviewed by this court. The seniority system in this case is approximately one hundred years old, has existed since the birth of railroading in the United States, involves the same craft structure which was recognized by the Federal Government in government operation of the railroads during World War I, and again by Congress in enacting the Railway Labor Act[5]. Mr. Justice Harlan explains in *Pennsylvania Railroad Company* v. *Rychlik,* 352 U.S. 480, 490 (1957):

---

[5] The railroad world had been compared to a state within a state having its own customs and vocabulary. Garrison, The National Railroad Adjustment Board: A unique administrative agency. 46 Yale Law Review 567 (1937). The Railway Labor Act, 45 U.S.C. Section 151 et seq, was adopted in 1926. This law did not create or in any way modify or change the existing crafts, but on the contrary, it recognized carft lines "which are drawn in the industry". *Order of Railway Conductors* v. *National Mediation Board,* 113 F. 2d 531, 533 (D.C. Cir. 1940).

> "Labor in this industry is organized largely on craft rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen, and conducters, for example, each are separately organized for the purpose of bargaining and normally different unions represent different crafts;"

Accordingly, the decision of the court below is in direct conflict with *Teamsters* v. *United States,* 431 U.S. 324 (1977).

The court below has so completely misconceived *Teamsters* as to make it impossible for a labor union to establish that a seniority system is bona fide. It renders meaningless the defense of a bona fide seniority system under the *Teamsters* guidelines. Great emphasis is placed by the Tenth Circiut Court of Appeals on the fact that the seniority system was begun at a time in the history of railroading when segregation was prevalent. If this were a relevant factor, the seniority system in *Teamsters* also would have fallen. Therefore, this court should grant certiorari to review the important question raised by the court below as to the proper interpretation of 42 U.S.C. Section 2000e-2(h), and the bona fides of this seniority system.

This court has already recognized the importance of the questions raised here by recently granting certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit to examine the legal criteria in establishing a bona fide seniority system. *Swint* v. *Pullman-Standard,* 624 F.2d 525 (5th Cir. 1980), cert granted, April 20, 1981, 49 U.S. L.W. 3788. The decision below presents a simpler and a narrower issue of great importance, namely the bona fides of a seniority system of a railroad craft in existence for a century and attacked here by the train porters, a craft which came into existence after the creation of the seniority system found not bona fide by the court below.

The district court finds that UTU had nothing to do with hiring or promoting, which was exercised exclusively by Santa Fe. Union membership was not a condition of employment. The

National Railroad Adjustment Board previously resolved the dispute among the crafts. The train porter craft was represented by its own union, the BSCP. The last train porter was hired by the Santa Fe in 1956, nine years before the effective date of Title VII. The district court finds that the UTU has no liability for post act discrimination because it neither had nor exercised any hiring or transfer authority and did not engage in any employment conduct which affected the Plaintiffs. The district court finds that the seniority system in question is neutral and rational because it applies equally to all brakemen and because the structure of the separate crafts or bargaining units is in accordance with industry practice and is consistent with the Railway Labor Act. The crafts are found to be substantially the same as they existed in the late 1800s, and as they existed on other railway lines in the United States.

The decision below states that the seniority system was illegal because train porters and chaircar attendants would have been required to give up their seniority in these positions in order to become brakemen. To hold UTU responsible for this is contrary to all law and without any legal precedent. The requirement that train porters and chaircar attendants give up their seniority to become brakemen was the result of a collective bargaining agreement between BSCP and Santa Fe. The record shows that the UTU had absolutely no control or influence over this. If this seniority system was not bona fide, it was the seniority system established by the Santa Fe and the BSCP, not UTU.

Train porters not only existed as a separate craft, they organized as a separate craft in accordance with the Railway Labor Act and with BSCP as their collective bargaining representative. Only BSCP could speak for and represent the craft. Santa Fe could not unilaterally change their status. *United Transportaiton Union* v. *Penn Central Company*, 443 F.2d 131 (6th Cir. 1971). UTU could not, without incurring potential liability, voluntarily sacrafice seniority rights of brakemen, whether or not union members, to persons not previously hav-

ing brakemen seniority. *Conley* v. *Gibson,* 355 U.S. 41, 46 (1957). The record in this case may show that the BSCP did not adequately represent its members. It may even show that the BSCP and the Santa Fe negotiated a senority system which was not bona fide. It does not show that the UTU discriminated against the train porters.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

William Sitzer
J. Dennis O'Leary
Of Counsel Dubail, Judge, Kilker,
O'Leary & Smith
Attorneys for Petitioner
One Mercantile Center
Suite 3210
St. Louis, Missouri 63101
(314) 241-4261

July 28, 1981

Appendix

APPENDIX A

Joe Vernon SEARS, an individual, in person and for all other persons similarly situated, Plaintiffs-Appellees and Cross-Appellants,

v.

Albert L. BENNETT, C. J. Skelton, Archie N. Jones, Forest D. Tollett, John W. Landrum, Lawson C. Spencer, Thomas H. White, Earlie Nash, Aubrey A. Robinson, Edward Rawlins, John W. Cole, Charles Majors, Jr., Jesse J. Smith, Paul H. Stewart, Jimmy E. Brown, Carl E. Chester, Ray E. Landrum, Raymond Willey, Elgie Crow and Ellis Johnson; Criscel Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey and W. W. Seymour, Intervenors-Plaintiffs-Appellees and Cross-Appellants,

The BROTHERHOOD OF SLEEPING CAR PORTERS, Plaintiff-Appellee and Cross-Appellant,

v.

The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, and United Transportation Union, successor to Brotherhood of Railway Trainmen, a labor organization, Defendants-Appellants and Cross-Appellees.

Nos. 78-1995, 78-1997 and 78-1998.

United States Court of Appeals,
Tenth Circuit.

Argued March 13, 1980.

Decided March 11, 1981.
Rehearing Denied in No. 78-1995
May 11, 1981.

LOGAN, Circuit Judge.

The Atchison, Topeka & Santa Fe Railway Company (Santa Fe) and the United Transportation Union (UTU)[1] appeal from a judgment holding that they violated the Civil Rights Act of 1964 (Title VII or the Act), 42 U.S.C. § 2000e *et seq.*, by perpetuating the effects of prior discrimination in a nonbona fide seniority system. Plaintiffs—black train porters, chair car attendants and their union—cross-appeal regarding elements of the back pay formula and showings required of individual class members by the court. The Equal Employment Opportunity Commission (EEOC) appeared as amicus on plaintiffs' behalf.

Plaintiff Joe Vernon Sears filed complaints against Santa Fe and UTU with the Kansas Commission on Civil Rights and the EEOC on March 8, 1966, and October 4, 1966, respectively, alleging that Santa Fe and the UTU had denied and were continuing to deny him and other black employees their rights under Title VII because of their race. On october 7, 1972, the EEOC notified Sears of his right to sue defendants; he filed suit in district court the following month on behalf of himself and others similarly situated. The district court certified the suit under Fed.R.Civ.P. 23(b)(2) and (c) as a class action on behalf of Sears and all other black train porters employed by Santa Fe in any capacity from July 2, 1965 to the time of class certification. The Brotherhood of Sleeping Car Porters (BSCP)[2] was

---

[1] UTU is the successor by merger to The Brotherhood of Railroad Trainmen (BRT) and the Order of Railroad Conductors and Brakemen (ORC&B). UTU and its predecessors have represented brakemen and conductors of the Santa Fe as collective bargaining agents since at least 1892.

[2] The BSCP merged with the "System Division" of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees effective April 1, 1978. The trial court recognized the change in party status, but continued to refer to the union as the BSCP, as we do here. See 545 F.Supp. at 160.

also admitted as a plaintiff. Santa Fe settled all claims for damages, back pay, and attorneys' fees with plaintiffs before trial, but remained a party in the suit for purposes of injunctive relief and seniority considerations.

With the parties' agreement, the court tried the case in phases and reported its findings in two decisions, one regarding liability, reported at 454 F.Supp. 158 (D.Kan. 1978), and the other dealing with damages (unpublished). The liability phase was tried by means of a joint presentation of stipulated facts, subject to objections of relevancy and materiality. The parties submitted briefs on the issue of damages, after which the court determined a method of arriving at back pay and seniority rights accruing to each member of the subclasses. It did not make individual awards, but retained jurisdiction to do so, finding it unnecessary to appoint a special master for the computation of back pay awards.

The issues on appeal are (1) whether the seniority system was bona fide within § 703(h) of the Act; (2) whether liability may be imposed on UTU for the impact created by the seniority system agreed to by UTU and Santa Fe; and (3) whether the court abused its discretion in its formulation of damages.

Some general background facts are in order. Train runs on the Santa Fe traditionally included passenger trains, through freights, local freights, and mixed passenger and freight trains. The train crews on local and through freight trains consisted of a conductor, head-end brakeman, rear-end brakeman, engineer and fireman. Santa Fe created the position of train porter in 1899. Train porters performed the duties of head-end brakemen on passenger trains and also attended to passengers and took care of the interior condition of passenger cars in their custody. Porters and head-end and rear-end brakemen on passenger trains received the same mileage rate or hourly rate from 1918 until termination of the job of train porter in 1975. However,

brakemen received additional compensation not paid to train porters, such as pay for delays. Thus, the total wages paid to a passenger brakeman were higher than those paid to a train porter. Most passenger trains also carried chair car attendants, non-operational personnel who attended to passengers' needs and cleaned the interior of the cars. They performed no braking duties. Train porters and chair car attendants were always black males. Between 1918 and 1959, the entry level job with the Santa Fe for a black man was the position of chair car attendant. Chair car attendants could qualify for the position of a train porter by taking a rules examination, passing a physical examination, and completing student trips on passenger trains. The newly qualified train porter would continue to work as a chair car attendant and would work as a porter when called from the extra board, a list of qualified porters who were not assigned to a regular run. With sufficient seniority, he could obtain a regular job as a porter.

The entry level for a nonblack man was the brakeman position. A white man could qualify for the brakeman position by taking a rules examination, passing a physical examination, and completing student trips on local frieght trains. The rules examination for a brakeman applicant and the administration thereof were the same as for train porters. Before 1960, a new hire started as an extra on all of the types of trains run by Santa Fe. After accumulating sufficient seniority, a brakeman could obtain a regular freight braking job. Generally a brakeman needed substantial seniority to obtain a regular braking job on passenger trains. Some brakemen never sought passenger work. A brakeman on a passenger train could return to freight service by exercising his seniority rights.

The Santa Fe has always maintained and published seniority rosters for each craft for each district or geographic area. An individual's seniority date is the earliest date of continuous service in a particular craft within a particular district. An employee's seniority date determines promotion opportunities as well as his

right to protect work within his craft and district. Seniority is not transferable from one district to another or from one craft to another. The first known contract containing seniority provisions was in 1892 agreement between Santa Fe and predecessors to UTU. In 1960, the seniority rosters of brakemen and yardmen were combined, giving them dual rights. After that date, a new hire was given a seniority date applicable to yard and road service.

A UTU predecessor, the Brotherhood of Railroad Trainmen (BRT), made several attempts to transfer braking duties from black train porters to white brakemen. BRT protested that the use of porters on passenger trains to perform the duties of head-end brakemen violated the contracts between the BRT and Santa Fe providing for the seniority rights and duties of brakemen. In 1959, the National Railroad Adjustment Board issued Award 19324, holding that only train porters holding a seniority date prior to April 20, 1942, could perform head-end braking duties. All train porters with a later seniority date were demoted to chair car attendants and could no longer perform braking duties.

In the instant case, the district court divided the plaintiff class into two subclasses: (1) those who were serving as train porters in 1965 when Title VII became effective and (2) those who had been reclassified as chair car attendants under Award 19324 and were serving in that capacity on July 2, 1965. The first group is composed of employees who had a seniority date earlier than April 20, 1942, and thus were allowed to continue in the porter position after Award 19324. Those in the second group once served as porters but had a seniority date after April 20, 1942, and thus were precluded from serving as train porters after 1959.

The district court held that both Santa Fe and the UTU engaged in a pre-Act system-wide policy and pattern of discrimination against black employees, that this discrimination

was perpetuated by the seniority system agreed to by both defendants, and that disparate impact created by the seniority system was not immunized by the § 703(h) exemption for bona fide seniority systems. The court also found that Santa Fe violated the Act by refusing to promote class members after the effective date of Title VII. The court imposed liability on UTU as well as on Santa Fe for the disparate impact of the seniority system on the porter subclass, reasoning that the union's role in creating and maintaining the seniority system was at least as great as the employer's. Although both defendants were deemed responsible for this discrimination, UTU alone was held liable for monetary damages and attorneys' fees because Santa Fe had settled with plaintiffs. (Damages due each class member were to be reduced by the amount received from the Santa Fe settlement.) Santa Fe alone was held liable with regard to the discrimination against the chair car attendant subclass because the court found UTU engaged in no post-Act discriminatory conduct against them. The district court noted that only those plaintiffs still actively employed would benefit from a seniority award; it has not determined whether any plaintiffs are so employed.

I. LIABILITY

[1] At the outset, we note that in a case tried on stipulated facts, as this one was, in which the observation of witnesses played no role in its findings, we evaluate and draw conclusions from the evidence without the deference ordinarily afforded a trial court's findings of fact. *Mid-Continent Casualty Co.* v. *Everett,* 340 F.2d 65, 70 (10th Cir. 1965). While the scope of our review is enlarged somewhat in such a case, the ordinary standard of review still inheres: findings of the trial court are set aside only if they are clearly erroneous. *Id.*

Plaintiffs claim that Santa Fe and UTU violated the Civil Rights Act of 1964 by perpetuating the effects of prior discriminatory conduct of employing blacks as train porters and

chair car attendants and excluding them from employment opportunities in the higher paying jobs of brakeman and conductor. Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national orgin."

[2] The district court held that plaintiffs met their burden of showing that racial discrimination was standard operating procedure for Santa Fe and UTU and its predecessors for nearly a century, carrying over past the effective date of Title VII through operation of the seniority system. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396 (1977).

> "The evidence is clear. For almost all the years of the Twentieth Century to date, there have been no black brakemen, no white train porters. Both positions required the performance of substantially similar braking duties; the difference in additional duties is insignificant compared to the similarity of total duties. The fact is that employees performing essentially the same duties were segregated into job category by race, and the evidence is

> overwhelming that such segregation was intentional. This is disparate treatment."

454 F.Supp. at 174. We will not restate the evidence supporting this conclusion. It is well summarized in the trial court's opinion, 454 F.Supp. at 162-73, and the findings are amply suppored by the record.

Santa Fe apparently concedes its liability for post-Act discriminatory hiring practices. Both Santa Fe and UTU argue that the only wrong involved here is merely discriminatory hiring practices. We disagree. Consideration of the validity of the seniority system is crucial to establishment of seniority rights of class members and to the liability of UTU for damages and back pay. The validity of the seniority system is at issue because that system perpetuated past discrimination. Both Santa Fe and UTU argue that the seniority system is valid under the rationale of *Teamsters.*

A. *The Seniority System*

The Civil Rights Act prohibits practices or procedures that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). The district court found that the seniority system agreed to by Santa Fe and UTU perpetuates the effects of pre-Act discrimination and thus violates Title VII by creating a disparate impact disfavoring plaintiffs. 454 F.Supp. at 174.

The operation of the seniority system complained of in this case is similar to that at issue in *Teamsters.* There minority drivers proved that a carrier of motor freights had engaged in a pre-Act pattern of discrimination by hiring minority applicants in serviceman or local driver positions rather than in the higher paying (long distance) line driver positions. The effects of this pre-Act discriminatory hiring were perpetuated by the seniority system embodied in the collective bargaining agreement between

the drivers' union and the employer, which required employees who transferred to line drivers' union and the employer, which required employees who transferred to line driver positions to forfeit seniority accumulated in a serviceman or local driver position. The Supreme Court found the seniority system created a disparate impact and would have been violative of the Civil Rights Act bur for § 703(h) of the Act which exempts bona fide seniority systems from the operation of the Act under certain circumstances.[3] The Santa Fe system requires the same sort of seniority forfeiture by porters and chair car attendants transferring to a brakeman position, and thus creates a disparate impact by perpetuating the effects of pre-Act discrimination. *See Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861; *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971). Thus, the crucial qusetion in the instant case is whether the seniority system at issue is immunized by § 703(h).

In *Teamsters,* the Supreme Court reasoned that in passing § 703(h) Congress intended "to make clear that the routine application of a bona fide seniority system[4] would not be unlawful under Title VII," despite the fact that it perpetuates the effects

---

[3] In relevant part, § 730(h), 42 U.S.C. § 2000e-2(h) provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, *provided that such differences are not the result of an intention to discriminate* because of race, color, religion, sex, or national origin ...."

(Emphasis added.)

[4] The court used the term bona fide seniority system to refer to a system within the § 703(h) exemption.

of pre-Act discrimination. 431 U.S. at 352, 97 S.Ct. at 1863 (footnote added). The Court recognized that the proviso to § 703(h) requires that any differences in treatment created by the system must not be the "result of an intention to discriminate because of race ... or national origin." *Id.* at 353, 97 S.Ct. at 1863. In considering the *Teamsters* seniority system, the Court indicated some of the circumstances that influenced its determination that the bona fides required by § 703(h) were met in that case.

> "The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into nonline-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-sur-named Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful."

431 U.S. at 355-56, 97 S.Ct. at 1864-65 (footnote omitted).

Relying on a Fifth Circuit distillation[3] of factors from the foregoing *Teamsters* statement, the district court held that San-

---

[3]In *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 787 (1978), the Fifth Circuit interpreted the statement of criteria from *Teamsters*.

ta Fe's seniority system met the first two factors considered by the Supreme Court but failed to meet the final two requirements because the system "had it genesis in racial discrimination and was created and maintained with illegal purpose." 454 F.Supp. at 179. Both defendants urge us to reverse the district court's holding of liability on the ground that the system is bona fide under *Teamsters*. While plaintiffs do not challenge the court's liability holding on appeal, they contend that, unlike the *Teamsters* system, this one was not rational and did not apply equally to the races involved as required by the *Teamsters* test. We agree with the district court's ultimate determination that the system is not within the protection of section 703(h), but our analysis differs somewhat from that of the district court.

Although the district court noted that the seniority system was not neutral in operation, it found the seniority system met the first factor of *Teamsters* because it is neutral on its face, applying equally to all individuals. "No transferee to a brakeman

---

> "*As we read the Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system or is not bona fide ... The Court's analysis suggests that the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue ... In *Teamsters* the Court focused on four factors:
>
> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system had its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose."

Id. at 351-52, 97 S.Ct. at 1862-63

position, black or white, would accrue seniority any differently than any other transferee." 454 F.Supp. at 179. The Supreme Court's explanation of the first factor in *Teamsters* focused on the impact of the system on the racial groups involved, indicating that facial neutrality of operation of the system is not determinative. The entire statement of the first factor considered by the Court follows:

> "The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. *The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-sur-named Americans; to the contrary, the overwhelming majority are white. . . .*"

431 U.S. at 355-56, 97 S.Ct. at 1864-65 (emphasis added). In *Teamsters,* the Supreme Court assessed the racial composition of the city drivers and servicemen. We believe the comparable group for consideration here is that portion of the train crew performing related jobs, composed of conductors, brakemen, porters, chair car attendants and switchmen. In 1960, the seniority lists of brakemen and switchmen were merged or "dualized" to allow movement between these "similar" crafts. This merger allowed all members of this operational crew—except porters and chair car attendants—to transfer without a loss of seniority. In dramatic contrast to *Teamsters, all* the employees in the relevant group "who are discouraged from transferring" are blacks. Thus, the seniority system here fails to meet the first criterion of *Teamsters.*

In regard to the second factor, the district court determined that the structure of separate crafts for porters, chair car attendants, and brakemen was "rational, in accord with industry practice, and consistent with Railway Labor Act [RLA] precedents," 454 F.Supp. at 179. The craft units have been recognized by the Railway Labor Board and were obviously in

accord with prevailing industry practice. We believe the creation of the porter and chair car attendant crafts was not rational because they were drawn along racial lines. The district court stated that the *Teamsters* court refused to invalidate a system which involved "the separation into two crafts by race." *Id.* But the Teamsters craft units were not drawn totally on racial lines. The majority of Teamsters drivers in all crafts were white; here 100% of all members of the porter craft are black. Second, two of the crafts, those of porter and brakeman, under consideration here performed the same functions.[6] Finally, we cannot agree with Santa Fe's argument that the Supreme Court recognized the rationality of the craft designations in *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952). That issue was not before the Court in *Howard.*[7]

---

[6]While defendants now contend that the positions are not substantially similar, the basis for UTU's protests before the Railway Labor Board was that the porters were performing duties given to brakemen by the seniority agreement, *i.e.,* that the two crafts performed the same function. *See also Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 771 n.3, 72 S.CT. 1022, 1024 n.3, 96 L.Ed. 1283 (1952) quoted *infra* note 11.

[7]Rather than ratifying the craft designations, the *Howard* Court implied the specious nature of the distinctions between the porter and brakeman crafts.

> "Since the Brotherhood has discriminated against 'train porters' instead of minority members of its own 'craft,' it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. . . .
>
> "As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name."

343 U.S. 768, 773, 72 S.Ct. 1022, 1025, 96 L.Ed. 1283 (1952).

The third factor mentioned in *Teamsters* is whether the seniority system had its genesis in racial discrimination. The brakemen's system was established in 1892, before the creation of the porter or chair car attendant crafts, in a "period when segregation was the standard operation procedure on the Santa Fe." 454 F.Supp. at 180. In this context the seniority system for brakemen may have originated without conscious regard to race, but the same may not be said of the later establishment of the black-only crafts.

The fourth and final factor is whether the system was maintained for a discriminatory purpose. The system was used as a sword by the union in its efforts to take plaintiffs' jobs from them. 454 F.Supp. at 180. Black men were not accepted as members in the brakemen's union. Beginning not later than 1920, the union sought the transfer of braking duties from black train porters to white brakemen, protesting that negotiated contracts between the BRT and Santa Fe provided that the brakeman with the highest seniority would perform the next available braking duty, and that by allowing porters to perform braking functions Santa Fe was violating those agreements. Ultimately, the National Railroad Adjustment Board held that only those train porters holding a seniority date prior to April 20, 1942, could perform front-end braking duties. All train porters with seniority dates subsequent to April 20, 1942, were demoted to chair car attendants. The evidence clearly supports the holding that the system was maintained for a racially discriminatory purpose.

[3,4] The existence of an all-white work force, even if created through discrimination, will not invalidate a seniority system protected under section 703(h). *Se Teamsters,* 431 U.S. at 350-51, 97 S.Ct. at 1862-63. But protection of that section is not extended to a system, such as this one, which creates employment differences with the intention of discriminating because of race. In sum, the brakeman's seniority system does not fall withint he exception created by Congress in section 703(h)

because it does not apply equally to all races, because it was not based on a rational craft delineation, and because it was maintained with the purpose of discriminating against black employees. As the Supreme Court recognized in *Teamsters*, liability is imposed on those responsible for a seniority system that is not protected by section 703(h) and that perpetuates the effects of Pre-Act discrimination. 431 U.S. at 349-50, 97 S.Ct. at 1861-62. In this case, Santa Fe is clearly liable. Since it has settled monetary claims, however, Santa Fe is affected by this holding only with respect to its future practices and the seniority relief granted to members of the subclasses still working for it.

B. *Union's Liability*

The district court predicated UTU's liability on § 703(c) of Title VII, which provides, in pertinent part: "It shall be an unlawful employment practice for a labor organization ... (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c). UTU contends that even if the seniority system is invalid under section 703(h), the union cannot be held liable. The essence of its arguments can be summarized as follows: (1) UTU exercised no hiring or transfer authority; (2) UTU did not influence Santa Fe's hiring policies and used only lawful means to protest the assignment of braking tasks to porters; (3) UTU owed plaintiffs no duty of representation.

[5] At trial, the parties stipulated that UTU had no hiring authority. 454 F.Supp. at 167. UTU contends that its lack of legal hiring or transfer authority is determinative.[4] Obviously,

---

[4]On this point, UTU stated in its brief that it is "inconceivable that UTU could be held liable for pre-Act discrimination while it was properly found to be not liable for post-Act discrimination." UTU Brief 14. The district court stated that "UTU has no liability for post-Act discriminatory conduct, for it neither had nor exercised any hiring and transfer authority, and therefore did not engage in any employment conduct which affected plaintiffs." 454 F.Supp. at 182. We believe that the court meant merely that plaintiffs had failed to make out a

lack of authority to hire or transfer is not determinative on the issue whether the union violated § 703(c). That section proscribes the indirect role of encouraging discrimination by an employer, by making it an unlawful hiring practice for unions to "cause or attempt to cause an employer to discriminate."

UTU argues that because the railroad was not a closed shop until 1965, its white membership requirement (removed in 1960) did not deter blacks from applying for brakeman positions or influence Santa Fe's hiring policies. Separately, UTU contends that its efforts to take braking duties from porters were simply "lawful resort" to administrative agencies to regain the disputed head-end braking duties, claiming that "[n]owhere in the record is there anything to support even an inference that on the Santa Fe UTU demanded that blacks be hired only as Chair Car Attendants or Train Porters." UTU Brief 22.

[6,7] We find these arguments unpersuasive. The net effect of UTU's actions was that it gained control of most braking work, and it allocated the work to its white members only. We agree with the district court's holdings that UTU's role in creating the invalid seniority system was at least as great as Santa Fe's, 454 F.Supp. at 180, and that the discrimination perpetuated by the seniority system "was approved by, acquiesced in, and maintained and demanded by the 'white' unions." 454 F.Supp. at 174. A union's role as a party to a collective bargaining agreement may be sufficient to impose back pay liability on the union. *See Kaplan* v. *International Alliance of Theatrical and Stage Employees,* 525 F.2d 1354, 1360 (9th Cir. 1975); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1381 (5th Cir.

---

case of post-Act discriminatory conduct. The statement obviously cannot mean that liability is imposed under Title VII only for discriminatory hiring practices. A few pages earlier the court found UTU liable under §703(c) for the disparate impact created by Santa Fe's pre-Act discrimination though the union clearly had no hiring authority.

1974). We hold that these actions were at least an attempt to cause the employer to discriminate against plaintiffs and, therefore, violated § 703(c).[9]

[8,9] The fact that UTU was the bargaining agent for brakemen and not for porters does not change the result. While the Railway Labor Act (RLA), 45 U.S.C. §151 *et seq.*, empowers unions to act as the exclusive bargaining agent for those it represents, it in no way immunizes a union's discrimination. Bargaining agents may not use their power to discriminate against the non-union or minority members of the craft they represent, *Steele* v. *Louisville & Nashville RR.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), or against minority employees in other craft designations. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 775, 72 S.Ct. 1022, 1026, 96 L.Ed. 1283 (1952).[10] Moreover, liability here is premised on the Civil Rights Act not on the RLA. While Title VII did not invalidate the RLA, it proscribes discriminatory conduct not dealt with and not immunized by the RLA.

---

[9]It is unnecessary for us to find that the union entered the agreement with the intention of discriminating. The action of agreeing to the seniority system was nonaccidental and deliberate. We conclude that the union "intentionally engag[ed] in an unlawful employment practice" within the meaning of 42 U.S.C. § 2000e-5(g). *See Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970).

[10]The facts of *Howard* are strikingly similar to those of the instant case. By threatening a strike, the Brotherhood of Railroad Trainmen forced a railroad to agree not to permit train porters to perform any braking duties. 343 U.S. at 771, 72 S.Ct. at 1024. Although the agreement, like the seniority provisions obtained by the same union in the present case, "did not in express words compel the discharge of 'train porters,' the economic unsoundness of keeping them after transfer of their 'brakeman' functions made complete abolition of the 'train porter' group inevitable." *Id.* Although the RLA lacks specific references to discriminatory conduct or the broad equitable powers of Title VII, the Supreme Court held the RLA prohibits the "bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." *Id.* at 774, 72 S.Ct. at 1025.

[10] Thus, the union's role infreezing the status quo of a prior discriminatory seniority system, not immunized under section 703(h), renders it liable to those upon whom the seniority system had an adverse impact.

The trial court gave relief against the union only to the train porter subclass, denying relief to the chair car attendants. It reasoned that the impact of the seniority system "is upon those class members who performed braking duties but did not accrue braking seniority, *i.e.*, persons employed as train porters." It also stated that because plaintiffs employed as chair car attendants at the effective date of the Act "were not performing braking duties, they had no right to accumulate brakeman seniority and the invalid seniority system had no discriminatory impact upon them." Plaintiffs argue that all class members, porters and chair car attendants alike, suffered the same disparate impact of a restriction of employment opportunities and thus all are entitled to the same relief. Defendants support the district court's denial of recovery to chair car attendants, but assert that the award to the porter subclass was improper because the porter position was not substantially similar to the brakeman position.

[11] We agree with the district court that the union is liable in damages to the porters. Notwithstanding defendants' assertions, the porters were Santa Fe employees performing braking functions essentially like the nonblack brakemen.[11] These

---

[11]The positions of porter and brakeman were compared to each other by the Supreme Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952).

> "In addition to doing all the work done by ordinary brakemen, train porters have been required to sweep the coaches and assist passengers to get on and off the trains. As the Court of Appeals noted. 'These aisle-sweeping and passenger-assisting tasks, however, are simply minor and incidental, occupying only, as the record shows, approximately five per cent of a train porter's time."

Id. at 771 n.3, 72 S.Ct. at 1024 n.3 (quoting *Howard* v. *St. Louis-San Francisco Ry. Co.*, 191 F.2d 442, 444 (8th Cir. 1951)).

porters were not denied the job, instead they were denied the title of brakeman, extra pay accruing to that position, and the opportunity for further employment advancement. These results were perpetuated into the post-Act period by the invalid seniority system. The union is liable because it helped perpetuate this discrimination. *See Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861. If the craft distinction between porters and brakemen is ignored as invalid, the union has a duty not to use its power to discriminate against non-union or minority members of the craft. *Steele* v. *Louisville & Nashville Ry.,* 323 U.S. at 192, 65 S.Ct. at 226. If the craft distinctions are credited, the union, nevertheless, has a duty not to discriminate against minority employees in the other craft designations. *See Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. at 774, 72 S.Ct. at 1025.

[12] The chair car attendant's position is different in some respects, but we hold that UTU is liable to this subclass also. The difference is that as of the effective date of Title VII these men were not performing braking functions. The union argues that the chair car attendants were a separate craft, not represented by UTU or its predecessors under the craft-type organization in effect in the railroad industry. All of this is true, but the chair car attendants were victims of the invalid seniority system, in the perpetuation of which the union played a major role. During all of the pre-Title VII years the entry level job on the Santa Fe for a black outside the Silsbee, Texas, district was as chair car attendant. Until 1959 a black could work up to the porter position, where he could perform a brakeman's functions and receive somewhat comparable pay. The entry level job for a white was as brakeman. The union helped perpetuate the discrimination by imposing all white membership rules until 1960, and by seeking and succeeding in obtaining demotion for these class members from the position of porter to chair car attendant. All members of this subclass qualified and served as train porters until demoted in 1959. After 1960, brakemen and

switchmen operated under merged seniority rosters. We understand they could be promoted to conductor and could work in that position without losing seniority as brakemen-switchmen. But members of the subclass of chair car attendants were frozen into their position. No one could be promoted to porter. There was no merger of porter or former porter chair car attendants seniority rosters with those of the brakemen-switchmen, nor any right, as we understand, to retain seniority in the old job if a brakeman's position was sought. This situation continued in the post-Act period under contracts negotiated between UTU and Santa Fe. The system discouraged application for the better paying brakemen's positions.

Teamsters said

> "One kind of practice 'fair in form, but discriminatory in operation' is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs:* 'Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.' 401 U.S., at 430 [9] S.Ct. at 853].
>
> Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very

> real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.' "

431 U.S. at 349-50, 97 S.Ct. at 1861-62 (footnote omitted).

[13] Labor unions as well as employers may be held liable for the perpetuation of prior discrimination through their role in negotiating collective bargaining agreements. *E.g., Kaplan* v. *International Alliance of Theatrical and Stage Employees,* 525 F.2d 1354 (9th Cir. 1975); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C.Cir.1973). Thus the trial court erred in not holding UTU liable in damages to the chair car attendant subclass.

II. REMEDIES

A. *Train Porters*

The district court held that "all members of this [porter] subclass are presumptively entitled to accrue brakeman's seniority and pay as of July 2, 1965," the effective date of the Act.[12] The court set the following formula to be used in figuring UTU's liability for back pay due each porter:

> "1) Determine the average compensation paid a white brakeman with seniority as of July 2, 1965, until the date the plaintiff could no longer work.
>
> 2) Subtract the actual compensation paid the class member.
>
> 3) Subtract the amount received by the class member from the Santa Fe settlement.

---

[12]The Act limits an award of back pay by providing that no award may accrue more than two years before the filing of a claim with EEOC. Sears filed his claim with EEOC on October 4, 1966. Since no award may be made retroactive to the Act, Sears' filing date entitles him and other members of the class to an award accruing from the effective date. *See Teamsters,* 431 U.S. at 356-57, 97 S.Ct. at 1865.

4) Add interest at the legal rate from July 2, 1965."

Order of October 23, 1978, at 9.

Plaintiffs assert that damages for this subclass should be computed using the average wages earned by a brakeman with sixteen to seventeen years of experience rather than being based on a brakeman with a seniority date of July 2, 1965. The trial court rejected that argument on the grounds that it would constitute an award retroactive to the Act. UTU attacks the use of the average brakeman's salary in the award formula, arguing that the inclusion of the freight brakeman salary in the average is improper because porters did not perform freight work. The district court included the salary of freight brakemen in the formula because:

> "it would be difficult to determine at this late date what each subclass members [sic] would have done in terms of making bids for positions. The chain of events cannot be reconstructed. By using averages, those high-paying and low-pay positions will be combined. . . . We think these class members are entitled to presume that there would have been opportunities for them to bid their seniority the same as white brakemen with similar seniority."

Order of October 23, 1978, at 8.

[14,15] Under Title VII the trial court has wide discretion in fashioning remedies to make victims of discrimination whole. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975); *United States* v. *Lee Way Motor Freight, Inc.,* 625 F.2d 918, 949 (10th Cir. 1979). This Court will vary the district court award only when that court has abused its discretion. *Stone* v. *D. A. & S. Oil Well Servicing, Inc.,* 624 F.2d 142, 144 (10th Cir. 1980). Clearly back pay and seniority are suitable remedies well within the broad discretion of the trial court.

[16,17] Nevertheless, we hold the trial court was incorrect in its belief that to grant back pay as if the porters had pre-Act seniority would violate the Act. The remedy fashioned by the court should represent a reasonable attempt to restore the victims of discrimination to a position where they would have been absent the unlawful impact of the seniority system. *See Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). If the court, in its attempt to carry out the "make whole" purposes of the act, assumes that a typical employee might have bid freight service as well as passenger service, we think it should also consider such an employee's typical length of service with Santa Fe in formulating an award. Such a formulation does not seem to us to constitute an award of seniority. An award of actual seniority is not an issue as to this subclass, because the last train porter working for the Santa Fe retired in 1975. Stipulation # 40. *See Teamsters,* 431 U.S. at 354-55, 97 S.Ct. at 1864-65. Recognition of the length of service of the employees in this subclass would merely reflect the level of pay they would have received absent discrimination. Moreover, no fictional seniority is involved; these are employees of Santa Fe who have done braking work for many years. Alternatively, in this situation a way of making the discriminatees whole would be to limit the comparison to the wages of brakemen who performed only passenger work, as that is the work actually done by these porters. With this concept of equal pay for equal work, seniority would not be a factor.

Although we recognize most passenger train brakemen have considerable seniority, as did these porters, we will not dictate to the trial court which alternative to choose. The court of appeals' duty is to require a "consistent and principled application of the back pay provision, consonant with the twin statutory objectives [to eradicate discrimination and make sufferors whole], while at the same time recognizing that the trial court will often have the keener appreciation of those facts and cir-

cumstances peculiar to particular cases." *Id.* 422 U.S. at 421-22, 95 S.Ct. at 2373-74.

B. *Chair Car Attendants*

The trial court limited relief to the chair car attendant subclass to awards of seniority, because Santa Fe settled monetary claims prior to trial and because it held UTU was not liable for post-Act discrimination. We have already found the union liable to this subclass. Under normal circumstances we would simply remand to the district court so that it might formulate a proper remedy. But it has already treated aspects of the remedy, considering seniority rights this subclass has against Santa Fe. Therefore, it seems appropriate to review the trial court's analysis on this issue and to provide guidance for the trial court.

In formulating back pay for the members of the chair car attendant subclass, different considerations apply than to the porter subclass. This is not a situation of equal pay for equal work; these individuals were not performing brakemen's duties on the effective date of Title VII. We think a proper back pay award against the union might treat the individuals as new hires without previous seniority, from and after the date they did or would have applied to become brakemen.

In formulating remedies for post-Act discriminatory refusals to promote, the district court here divided the subclass of chair car attendants into two groups: those who applied for the position of brakeman and those who did not apply for that position. Order of October 23, 1978, at 10. In order to take advantage of the presumptions that he was able to perform the job functions of a brakeman and that a vacancy for a brakeman existed at the relevant time, the district court required each applicant to establish the date he applied for transfer or promotion and that he was physically qualified for the job. The proof required of each nonapplicant was that:

"a) he would have applied for transfer or promotion, being willing to give up his February 7 [1966] Agreement protection and his chair car attendant seniority, and would have been willing to begin at the bottom of the brakeman seniority roster;

b) the date he would have applied for transfer or promotion under these conditions; and

c) that he was physically qualified for the job."

Order of October 23, 1978, at 16.

We agree that a nonapplicant should show when he would have applied. The *Teamsters* court said

"To conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however, from holding that nonapplicants are always entitled to such relief. A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that *he would have applied for the job had it not been for those practices.* When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the [same] presumption. . . ."

431 U.S. at 367-68, 97 S.Ct. at 1870-71 (emphasis added).

We believe, however, that a member of the subclass who actually applied to become a brakeman should be allowed to show that he would have applied sooner (no earlier than July 2, 1965) had it not been for the unlawful discriminatory practices by defendants. To hold otherwise favors one who never challenged the system over one who, after delay, mustered the courage to make actual application.

Also, those who show they would have applied before February 7, 1966, should not be required to demonstrate they would have been willing to give up the job protection of the February 7 agreement. Until that time they had no protectable agreement right to give up. Also, as to those individuals, they should not be required to show they would have given up their chair car attendant's seniority. Until the February 7 agreement the chair car attendants had no collective bargaining agreement giving them seniority protection.

Affirmed in part, reversed in part. The case is remanded for further proceedings consistent with this opinion.

MAY TERM - MAY 11, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

Joe Vernon Sears, *et al.*,
Plaintiffs-Appellants
Cross-Appellees,

vs.

The Atchison, Topeka & Santa Fe Railway Company, *et al.*,
Defendants-Appellees
Cross-Appellants.

Equal Employment Opportunity Commission,
Amicus Curiae.

No. 78-1995
No. 78-1997
No. 78-1998

This matter comes on for consideration of the petition of United Transportation Union for rehearing and suggestion for rehearing en banc in the captioned cases.

The Court has for consideration a motion of appellant/cross-appellee, the Brotherhood of Sleeping Car Porters, for issuance of the mandate. The Court also has appellees/cross-appellants' bill of costs.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

The Court further orders that the mandate in these cases shall issue seven (7) days after the entry of this order in accordance with Rule 41, Federal Rules of Appellate Procedure.

The appellee/cross-appellants' bill of costs is ordered filed as of March 26, 1981, and the Clerk is directed to prepare a statement of costs in accordance therewith for insertion in the mandate in these cases.

HOWARD K. PHILLIPS
Clerk

By: /s/ Robert L. Hoecker

APPENDIX B

Joe Vernon SEARS, an Individual, in person and for all other persons similarly situated, Plaintiffs,

v.

The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, and United Transportation Union, a successor to Brotherhood of Railway Trainment, a labor organization, Defendants.

Civ. A. No. W-4963.

United States District Court,
D. Kansas.

June 14, 1978.

Terry G. Paup, Wichita, Kan., Hinson & Hinson, Houston, Tex., Chester Lewis, of Lewis & Davis, Wichita, Kan., for plaintiffs.

Thomas R. Conklin, J. B. Reeves, Law Dept., Topeka, Kan., Thomas J. Fitzgerald, Chicago, Ill., for Atchison, Topeka & Santa Fe Ry. Co.

Payne H. Ratner, Jr., Wichita, Kan., Charles R. Judge, William C. Maier, of Dubail, Judge, Kilker and Maier, St. Louis, Mo., for United Transp. Union.

MEMORANDUM OF DECISION

WESLEY E. BROWN, District Judge.

BACKGROUND

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* [Title VII or the Act]. Plaintiffs and class members[1] charge The Atchison, Topeka and Santa Fe Railway [Santa Fe] and the United Transportation Union [UTU], successor to the Brotherhood of Railway Trainment [BRT] and the Order of Railway Conductors and Brakemen [ORC&B], with having engaged in a policy and practice of discrimination on account of race in their dealings with plaintiffs and other black train porters employed by Santa Fe, in violation of Title VII.

The plaintiffs are black male Americans who at any time were employed by Santa Fe as train porters, also know as porter-brakemen, and who have been employed by Santa Fe, in any capacity, during the period from July 2, 1965, to the present. The Brotherhood of Sleeping Car Porters [BSCP], an unincorporated labor association certified to represent train porters

---

[1] The action was initially filed by Joe Vernon Sears as a class action. The Court ordered that Criscell Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour be permitted to intervene on September 3, 1975. On December 16, 1975, the Court granted leave to intervene as named party plaintiffs to Albert L. Bennett, C. J. Skelton, Archie N. Jones, Forrest P. Tollett, John W. Landrum, Lawson C. Spencer, Thomas H. White, Earlie Nash, Aubrey A. Robinson, Edward Rawlins, John W. Cole, Charles Majors, Jr., Jessie J. Smith, Paul H. Stewart, Jimmy E. Brown, Carl E. Chester, Raymond Wiley, Elgie Crow, Ellis Johnson, and Ray E. Landrum.

since April 5, 1946, is also a party plaintiff. The BSCP was merged with the "System Division" of The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees [BRAC], effective April 1, 1978. Because of the merger, the appropriate division of BRAC is a party plaintiff, but all relevant actions were taken by the BSCP, and any judgment rendered by this Court will be as to the BSCP, subject to later action if necessary.

The defendant Santa Fe is a Delaware corporation which conducts interstate transportation by railroad. Santa Fe rail lines extend from Chicago, Illinois, west to San Francisco, California, and south to Houston, Texas.[2] At all times material, Santa Fe was organized for operating purposes into three subdivisions: Eastern Lines, operating in Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, and New Mexico; Western Lines, operating in Kansas, Oklahoma, Texas, Louisiana, and New Mexico; and Coast Lines, operating in New Mexico, Arizona, and California.

The UTU is an unincorporated labor union consisting of an International union, local unions, and intermediate bodies. The UTU or its predecessors, BRT and ORC&B, are and have been the certified bargaining representatives for brakemen and conductors since the 1920's. The BRT and ORC&B merged into the UTU, effective January 1, 1969. The UTU and its predecessors, BRT and ORC&B, have represented, in labor matters, some members of the crafts of brakemen and conductors since 1868. From 1868 until 1966 the Santa Fe was an "open shop" employer and membership in a union was not a condition of employement. Since 1966, the Santa Fe has been a "union

---

[2] For the purposes and issues herein, the Gulf, Colorado and Santa Fe Railroad Company and the Panhandle and Santa Fe Railroad Company, both separate corporations, were part of the Santa Fe. Both of these corporations were merged into the Santa Fe on August 1, 1965.

shop" employer and membership in a union, certified to represent the employee craft by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, is required within thirty days of employment. The parties have stipulated that the UTU is capable of being sued and is properly being sued in this action.

Plaintiff Joe Vernon Sears filed a Complaint against Santa Fe and UTU with the Kansas Commission on Civil Rights [KCCR] on March 8, 1966, alleging that Santa Fe and UTU had denied and were denying him and other Santa Fe train porters their rights under Title VII by reason of race. Sears filed a Complaint with the Equal Employment Opportunity Commission [EEOC] on October 4, 1966, setting for the same charges as brought before the KCCR, and the EEOC asserted jurisdiction over Sears' complaint. On October 7, 1972, Sears was notified by the EEOC that he was entitled to file suit against defendants under Title VII. Several other plaintiffs also filed Complaints with the EEOC and were notified of their right to sue. The parties have stipulated that the jurisdictional requirements to bring suit under Title VII have been satisfied by plaintiffs and class members, and that venue is proper in this district.

On August 4, 1975, the Court entered an Order pursuant to Rule 23, Fed.R.Civ.P., that this action is maintainable as a class action under Rule 23(b)(2), on behalf of a class composed of the plaintiffs and all other black train porters employed by Santa Fe, in any capacity, during the period from July 2, 1965, to the present. Thereafter, on September 8, 1976, the Court, following notice to all class members, entered an Order Approving Compromise and Dismissal of Back Pay and Attorneys' Fees Claim Against Defendant Santa Fe, with respect to plaintiffs and class members except Criscell Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour. On December 29, 1976, January 3, 1977, and January 4, 1977, plaintiffs Kemp, Bennett, Woolfolk, Luckey, and Seymour each entered into Covenants Not to Sue with Santa Fe, and compromised and dismissed their respective back pay and attorneys' fees

claims against Santa Fe. As a result, all plaintiffs and class members have compromised and settled their back pay and attorneys' fees claims with defendnts Santa Fe.

On January 16, 1978, the BSCP was joined as a party plaintiff. Trial of this matter was had to the Court by means of a joint presentation of stipulated facts, subject to objections of relevancy and materiality, filed February 8, 1978. In connection with this presentation, each party also filed numerous exhibits. Memorandum briefs and reply briefs were subsequently filed by each party. The record before the Court is complete. The parties are agreed that this action will be bifurcated into a liability and a damage stage, the latter to follow only if liability is found. We now turn our attention to the question of the liability of defendants.

THE ISSUES

Plaintiffs contend that the Santa Fe, and UTU, and the UTU's predecessors have, for over three quarters of a century, engaged in a systematic campaign and practice of excluding blacks, and more particularly, black train porters, from employment as brakemen, conductors, and supervisory or management personnel with Santa Fe. Plaintiffs claim that they have suffered disparate treatment because Santa Fe denied employment opportunity to blacks by employing and retaining blacks in the traditionally Negro crafts of train porter and chair car attendant. Plaintiffs also claim that the seniority systems for the relevant crafts, entered into and maintained through collective bargaining agreements between Santa Fe and the BRT and ORC&B, have had a discriminatory impact upon them by locking them into the crafts of train porter and chair car attendant. Plaintiffs contend that the result of the seniority system is to perpetuate the effects of prior discrimination, establishing a Title VII violation even though the actual discriminatory acts may have occurred before the effective date of Title VII [pre-Act]. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28

L.Ed.2d 158 (1971) [*Griggs*]. Plaintiffs contend that the seniority system is not bona fide within the meaning of *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) [*Teamsters*]. In part, plaintiffs assert that the seniority system is not bona fide under Title VII because of the defendant unions' failure to cradicate discrimination, alleging that the unions had a duty to plaintiffs to cradicate discrimination against them. Plaintiffs further contend that their rights should be governed by Title VII rather than the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, so that defendants cannot defend their conduct by asserting that such conduct was immunized by the Railway Labor Act. Plaintiffs seek equitable and injunctive relief against Santa Fe and UTU whereunder the plaintiffs and all class members are granted seniority rights as brakemen and conductors retroactive to July 2, 1965, the effective date of Title VII. In addition, plaintiffs seek to recover from the UTU, on behalf of themselves and all other class members, an award of back pay and their reasonable attorneys' fees and costs incurred herein. It is stipulated that plaintiffs have settled all damage and attorneys' fees claims with the Santa Fe.

Both Santa Fe and the UTU contend that plaintiffs have failed to make out a case of discrimination. Defendants assert that the discriminatory conduct, if any, was in hiring plaintiffs as chair car attendants and train porters rather than as brakemen, acts which were done before the effective date of Title VII, and that under the doctrine of *United Airlines Inc.* v. *Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) [*Evans*], the effect of discriminatory hiring is not a continuing violation past the effective date of the Act. In the altnerative, defendants claim that even if plaintiffs have established racial discrimination perpetuated into the period covered by Title VII by a seniority system, the seniority system is bona fide pursuant to § 703(h) of Title VII and *Teamsters,* and therefore there can be no violation of Title VII.

Santa Fe contends that it in no way discriminated against plaintiffs in violation of Title VII, either pre-Act or post-Act. The railroad asserts that under § 703(j) of the Act, it is not required to grant preferential treatment to a group because of race. Santa Fe contends that it is bound by the provisions of the Railway Labor Act. Accordingly, Santa Fe states that it must recognize, for collective bargaining purposes, and UTU and its predecessors as the union certified to represent brakemen and conductors, and the BSCP as the union certified to represent train porters and chair car attendants. Furthermore, Santa Fe contends that it is bound by decisions rendered under and in accordance with the Railway Labor Act. Santa Fe contends that it has no right to unilaterally transfer employees under the Railway Labor Act, and points out that plaintiffs' certified representative, the BSCP, objected to the alleged offering of jobs in other crafts by the Santa Fe to employees represented by the BSCP, after the effective date of the Act. Santa Fe contends that post-Act statistics offered by plaintiff are of little evidentiary value, and fail to make out a prima facie case of post-Act discrimination.

The UTU joins Santa Fe in asserting that the statistical evidence submitted by plaintiffs fails to show discrimination against the plaintiff class. On its own behalf, UTU contends that it is and its predecessors were prohibited by the Railway Labor Act from representing the plaintiff class because they were represented by the BSCP, and that the UTU had no duty to plaintiffs to attempt to eradicate alleged discrimination against them. UTU asserts that BSCP, as plaintiffs' certified bargaining representative, could have worked on plaintiffs' behalf. UTU contends that Santa Fe has exclusive hiring and promotion authority, and that the UTU is not liable or responsible for any acts Santa Fe may e done pursuant to that authority. The UTU asserts that it and its predecessors were certified to represent brakemen and conductors, and actions on behalf of these crafts were not discriminatory, but were within the framework of the Railway Labor Act.

The defendants deny that plaintiffs are entitled to relief. They contend that plaintiffs and class members, even in the absene of any discrimination, should such discrimination be found, would not have obtained better paying positions by reason of their lack of qualifications and are therefore precluded individually from receiving monetary relief. Defendants further contend, in the event that seniority is awarded plaintiffs, that the rights of white brakemen and conductors should be taken into account. The question of relief, of course, is for the second stage of this action, and is not before the Court at this time.

THE FACTS

The stipulated facts are by reference made a part of the decision. We summarize those relevant facts which are necessary to an understanding of the views expressed herein.

The operation of trains by Santa Fe and other railroads requires the performance of braking duties. These duties include the inspection of the train cars, the testing of signals and brake apparatus for the safety of train movement, the use of hand and lamp signals for the protection and movement of trains, opening and closing switches, coupling and uncoupling cars and engines and the hose and chain attachments thereof, the comparison of watches when required by the rules of the company, reporting to and receiving instructions from the train master, and while on duty, being under the direction of the conductor and performing such other braking duties as may be necessary.

Historically, the Santa Fe train runs include passenger trains, through freight trains, local freights, and mixed passenger and freight trains. Traditionally, the train crew on local and through freight trains consisted of a conductor, head-end brakeman, rear-end brakeman, engineer and fireman. Train porters were not employed on freight trains. The train crew on passenger trains traditionally consisted of a conductor, a train porter or head-end brakeman, a rear-end brakeman, a fireman, and engineer. Arizona and California, in the Coast Lines subdivi-

sion, and Texas, had at one time full crew laws. These laws required that two brakemen be employed. As a result, train porters did not work in Arizona and California. Full crew law requirements were abolished by 1964.

After 1944, except in full crew law states, Santa Fe phased out train porters or head-end brakemen on passenger trains, accomplishing this through attrition and the reduction of passenger service. After 1964, Santa Fe phased out head-end brakemen in the full crew law states, except where labor agreements dictated otherwise. Head-end braking functions were assumed by other members of the operational crew after being phased away from brakemen and train porters. The last train porter on the Santa Fe last worked in July 1975.[3] Those plaintiffs who are still active with the railroad work in capacities other than train porter. Effective May 1, 1971, the Santa Fe discontinued passenger trains and Amtrak took over passenger service.

A head-end brakeman or a train porter on a passenger train performed the same duties. These were:

(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

(b) Use hand and lamp signals for the protection and movement of trains.

(c) Open and close switches.

(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

---

[3] Joe Vernon Sears, the last train porter with the Santa Fe, retired in August 1975.

(e) Compare watches when required by rule.[4]

These employees also assisted the conductor and performed work directed and supervised by the conductor.

A train porter on a passenger train performed additional duties, attending to passengers in the first car and the interior condition of the car. A train porter wore a uniform. Train porters worked only on passenger trains. Train porters and head-end and rear-end brakemen on passenger trains received the same mileage rate of hourly rate from 1918 until termination of the job of train porter in 1975. However, the brakemen on passenger trains received additional compensation such as pay in connection with delays no paid to a train porter. The total wages to a brakeman on a passenger train were higher than the total wages paid to a train porter on a passenger train. Brakeman rate of pay varied by type of train.

Most passenger trains also carried chair car attendants. Chair car attendants are non-operational personnel, and do not perform any braking duties. The duties of a chair car attendant in-

---

[4] These duties were described in this manner in Supplement No. 12 to General Order 27, issued by the District General of Railroads on December 2, 1918. General Order 27 also provided:

> Effective June 1, 1918, colored men employed as firemen, trainmen and switchmen shall be paid the same rate of wages as are paid white men in the same category.

Supplement No. 12 to General Order 27 also provided:

> 2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.
>
> 3. This order shall not curtail the duties of employees heretofore classed as "train porters."
>
> 4. This order shall not infringe upon the seniority rights of white brakemen.

clude attending to the passengers in a given train car or cars and to the condition of the interior of the car or cars. He worked passenger trains only.

Brakemen had additional duties on non-passenger train runs. On local freight trains, a brakeman's duties included inspecting the consist of the train (i. e., the arrangement or alignment of freight cars on a freight train in accordance with operating procedures and safety regulations), adjusting the consist of the train, walking alongside the train for inspection at stops, dropping off empty and full freight cars for customers, picking up empty and full freight cars from customers, respotting cars, and repairing cars dropped off by through freight trains. Uniforms were not required or worn by local freight brakemen since the work and equipment soiled any clothing worn. The duties of a brakeman on a through freight train were substantially similar to those on a local freight train.

A yardman or switchman works within a specific geographic area, the train yard. A yardman switches freight and passenger equipment, transfers freight and passenger equipment, and handles construction and maintenance of way trains and work trains operating in the yardman's territory. On May 30, 1960, the seniority lists of yardmen and brakemen were dualized on the Santa Fe. After May 30, 1960, to the present time, a new hire generally starts work in the yard moving cars, switching, performing minor car repairs and other railroad yard work. After gaining sufficient seniority the yardman can move to the frieght extra board protecting local and freight brakeman service and than passenger services (now discontinued), if seniority permits and the brakeman is qualified and so desires.

The conductor of a freight or passenger train had the ultimate responsibility for the operation of a train, pursuant to the operating rules of the Santa Fe and train orders.

A flagman performs flagman functions and rear-end braking on a passenger train.

The term "trainmen" is generally understood to mean freight and passenger brakemen, flagmen, train baggagemen, and brakemen baggagemen.

Railroad crafts or classes are denominated by the National Mediation Board,[3] which designated employees of a carrier according to traditional work functions who are generally organized with a certified representative to make and maintain agreements with the carrier under the Railway Labor Act. This law suit is concerned with the crafts of train porter, brakeman, conductor, and tangentially chair car attendant insofar as many plaintiffs and class members have served as chair car attendants with the Santa Fe. The ORC&B was certified to represent the conductors on the Santa Fe in 1926. The BRT was certified to represent the brakemen on the Santa Fe in 1926. The BSCP was certified to represent the train porters and chair car attendants in separate proceedings on April 5, 1946. From and after the dates of the above respective certifications, the conductors, brakemen and train porters and chair car attendants were recognized as separate crafts under the Railway Labor Act. The crafts were recognized by the federal government in General Order 27 in 1918 (*See* note 4).

The position of train porter was created by the Santa Fe on or about March 1, 1899. Train porter positions have always been filled by black males. In most instances between the dates of

---

[3] The National Mediation Board is an independent agency in the executive branch of government established by the Railway Labor Act, and is known as the Mediation Board. parties or either party to a dispute between employees and carrier concerning changes in rates of pay, rules, or working conditions, or any other dispute not referable to the National Railway Adjustment Board may invoke the services of the Mediation Board. The National Railway Adjustment Board, also known as the Adjustment Board, is divided into four divisions with jurisdiction over disputes involving employee crafts within that division.

1918 and 1959,[6] the entry level job with the Santa Fe for a black man was the position of chair car attendant. Chair car attendants could qualify for, and be promoted to, the position of a train porter upon taking a Rules Examination, completing student trips on passenger trains, and satisfactorily passing a physical examination. The Rules Examination was both written and oral, and the written portion thereof consisted of an open book test containing questions concerning the Santa Fe operating Book of Rules. This examination was not a test which was failed or passed, and was used by the Santa Fe as a learning process to familiarize the applicant with the SAnt Fe operating rules. Likewise, the later oral examination was administered for the purpose of determining whether the applicant understood the Santa Fe Book of Rules and to clear up any misunderstanding he might have with respect to them. The Rules Examination was given by the train master at the location of the application. Upon satisfactory completion of the Rules Examination, student trips and physical examination, a black chair car attendant was promoted to the position of train porter and was thereafter qualified to perform front end braking duties on passenger trains. Also, in certain instances, the Santa Fe would directly hire a black man as a train porter, and on other occasions train porters were hired by the Santa Fe from other jobs. There was no requirement that a chair car attendant proceed in a timely manner to the craft of train porter or else lose his job with the Santa Fe.

The Santa Fe has, at all times, maintained seniority districts within the operating divisions for each craft. The seniority district is a certain georgraphic area and within the district a published seniority roster is maintained. The seniority roster carried an individual's seniority date, which is the earliest date

---

[6] After 1959, the Santa Fe was prohibited from hiring a new man to the job of train porter because of the ruling in Award 19324, discussed *infra*.

of continuous service on the Santa Fe, in a given craft. Seniority in craft determines the right to protect work within the craft (within the seniority district), to obtain regular runs, order of ruthlough and recall, as well as other employment rights. Seniority is not transferable from one seniority district to another, nor is it transferable from one craft to another craft.

Seniority as a chair car attendant began as of the date the man first went to work as a chair car attendant. The seniority date on a Santa Fe train porter's seniority roster was the date a man first became qualified as a train porter. A train porter continued to accumulate senioirty on a chair car attendant's roster after he began working as a train proter, in addition to his train porter seniority. At all times, and within the various seniority districts for chair car attendants and train porters, two separate seniority rosters were maintained with one being for train porters and the other being for chair car attendants. On May 1, 1950, the BSCP and Santa Fe executed a collective bargaining contract for chair car attendants which set forth seniority provisions for chair car attendants. Prior to this time, the seniority system for chair car attendants had been maintained by Santa Fe on the basis of custom and practice. There has never been a written collective bargaining agreement covering seniority for train porters, although the Santa Fe and the BSCP did enter into written contracts concerning rates of pay, vacations, and prescribed uniforms for the train porters. The seniority system for Santa Fe train porters was established through custom, practice, published seniority rosters, and recognized by the Train Service Board and National Railway Adjustment Board (successor to the Train Service Board) decisions during the years the Santa Fe employed train porters, and was based upon time and service on the Santa Fe in a train porter's seniority district.[1]

---

[1] It is the testimony of plaintiff Arthur L. Woolfolk, who was active in the union affairs of the BSCP, that Santa Fe always took the position with the BSCP that Santa Fe did not want to negotiate a contract for the train porters until the "Hunter Litigation," which culminated in Award 19324, was finally terminated or resolved.

A chair car attendant started working off of the chair car attendant's extra board[4] until he had sufficient seniority to bid for an advertised regular job on a passenger train in his seniority district. After becoming a train porter's extra board, protecting against temporary vacancies in train porter positions. After accumulating sufficient seniority, he could likewise obtain a regular job as a train porter on a Santa Fe passenger train.

A non-black man desiring to be a brakeman qualified for that position with the Santa Fe upon taking a Rules Examination, completing student trips on local freight trains, and by satisfactorily passing a physical examination. The Rules Examination for a brakeman applicant and the administration thereof was the same as for train porters. Upon satisfactory completion of the Rules Examination, student trips and physical examination, the applicant wsa employed by the Santa Fe as a brakeman qualified to perform braking duties on the Santa Fe. Generally, prior to 1971, although the requirement varied from time to time, the Santa Fe required a high school education as a qualification for an applicant to the position of brakeman. This requirement was eliminated in 1971 by the Santa Fe. From 1918 until July 2, 1965, with the exception of the Silsbee, Texas

---

[4] Working off the extra board generally meant that the employee was available for call to temporarily take the place of an employee who did hold a regular job, but who was absent for reason of illness, vacation or otherwise. The employee called off the extra board would be protecting the job or work for which he was called. When vacancies occurred in regularly held or full-time jobs, the jobs would be "advertised" for bid by Santa Fe, usually through a bulletin, and the employee with the most seniority who bid pursuant to the advertisement got the job.

Seniority District,[9] front-end and rear-end braking duties on Santa Fe freight trains were performed exclusively by non-black males employed by the SAnta Fe as brakemen. The seniority system for Santa Fe brakemen mandated the promotion of a stated number of brakemen to the position of conductor on the basis of seniority, and only after they had had at least two years experience in the freight service. Promotion from brakeman to conductor was mandatory if the employee was to stay in service. Brakemen took a qualifying examination as a prerequisite to becoming a conductor. On July 2, 1965, the effective date of Title VII, except in the Silsbee District the Santa Fe did not employ a single black conductor. There were no black conductors outside the Silsbee District until 1970.

A brakeman's seniority began as of the date the man first started to work as a brakeman or, after the dualization of the yardmen and brakemen's seniority system in 1960, the date he first started to work as a Santa Fe switchman-brakeman. The seniority date on a Santa Fe conductor's senioirty roster was determined as of the date a man was promoted to, or hired as, a Santa Fe conductor. Within the seniority districts separate seniority rosters were maintained for brakemen and conductors.

Under the seniority system for Santa Fe brakemen, prior to 1960, a new hire normally started protecting all extra services for which he qualified, which could be local freight, through

---

[9] The Silsbee, Texas Seniority District has been something of an anomaly in the history of the Santa Fe, for black rather than white males have been predominantly employed as brakement in that district. There were 55 black brakemen in the Silsbee District as of the effective date of Title VII. However, there were apparently no black conductors in the Silsbee District as of the effective date of the Act. It is the testimony of Fred Douglas Woodberry, who has been employed in the Silsbee District as brakeman, conductor, and engine foreman, that from July 22, 1940 until September, 1965, there were no black conductors in the Silsbee District. Statistics indicate that as of 1965, there were four black conductors in the Silsbee District.

freight, mixed trains, passenger trains, road switchers and work trains. After accumulating sufficient seniority the brakeman could obtain regular braking jobs on through freight trains. Generally a brakeman needed substantial seniority to obtain a regular braking job on passenger trains. Some brakemen never sought braking work on passenger trains; and once a brakeman obtained a regular position as a brakeman on a passenger train, he could also return to freight service by exercising his seniority rights. In 1960 and thereafter, after the seniority systems of yardmen and brakemen were dualized, a new hire seeking a job as brakeman would generally start on the extra board for yardmen, performing switching work. With sufficient seniority, a switchman-yardman could obtain a regular positon in the Santa Fe, and as the extra board for Santa Fe brakemen required more men, he could obtain a position on the brakemen's extra board on the basis of his seniority. He could then proceed as a brakeman as outlined above.

The seniority system for brakemen and conductors was established under collective bargaining contracts negotiated by the BRT and ORC&B with the Santa Fe. From prior to 1892 until merged into the UTU on January 1, 1969, the BRT and ORC&B were separate labor unions; both unions represented the crafts of brakemen and conductors from before 1892 until the merger; both unions were certified to represent their respective craft of brakeman and conductor on the Santa Fe in 1926. The first known contract containing seniority provisions was an agreement executed on April 1, 1892, by the Santa Fe and the BRT and the Order of Railway Conductors, predecessor to the ORC&B. Thereafter, according to all evidence before this Court, separate contracts were negotiated by the BRT and the ORC&B with Santa Fe, and those contracts likewise contained seniority provisions for brakemen and conductors respectively. The evidence includes seniority provisions from Santa Fe's Schedule of Rates, Rules and Regulations for Trainman dated 1904, 1907, 1910, 1917, 1923, 1928, 1940, 1943, 1948, 1956, 1964, and 1966. At all times, an employee's seniority date in a

craft began when he first worked in or was promoted to that craft, and position on a seniority roster determined the type of work and promotion opportunities an employee could attain.

In 1883 the BRT established its first Constitution. Membership requirements were: male, sober, industrious and employed as a brakeman by a railroad. By 1939, the BRT Constitution provided that a candidate for membership shall have been employed as a railroad trainman for at least one month prior to application for admission and shall be white, male, sober, industrious and join of his own free will. The evidence before the Court does not disclose, and the parties do not know, if the 1939 requirement that a BRT member be white as in existence before 1939. The requirement that a member be white was retained by the BRT until 1960. The first known Constitution of the ORC&B is dated May 7, 1934, and requires for membership: any white male who had qualified as a train or yard conductor and had at least six months experience in road or yard service at the time of application. The requirement that a member be white was retained by the ORC&B until 1966. The UTU, successor to the BRT and the ORC&B, provides in its 1975 Constitution that any person of good moral character employed in a craft represented by the UTU is eligible to membership.

Hiring and promoting employees is a retained right of management of the Santa Fe, and unions are not authorized to make these decisions.

The certified bargaining representatives of brakemen have acted throughout the history of the railroad to ensure that braking duties are performed by its members. Beginning not later than 1920, the BRT made several attempts to transfer braking duties from black train porters to white brakemen. These attempts took the form of letter requests, demands, legislative lobbying, proceedings before the Train Service Board of Adjustment, the National Railroad Adjustment Board, First Division, and were also the subject of litigation in the federal courts.

It appears from the evidence that BRT had no black members, nor Santa Fe black brakemen or conductors, at any time when these attempts were made. The BRT was ultimately successful. In Award 19324, issued October 14, 1959, the National Railroad Adjustment Board, First Division, held that only those train porters holding a seniority date prior to April 20, 1942, could perform front-end braking as a part of their duties. All train porters who had a seniority date subsequent to April 20, 1942, were demoted to chair car attendants and could no longer work as train porters.

The main thrust of the BRT protests was that contracts between the BRT and the Santa Fe provided for the seniority rights and duties of brakemen, that on passenger trains the duties of head-end brakemen were being performed by train porters, and that the train porters were not on the brakemen's seniority roster. This protest can be seen in a number of incidences. The General Chairman for the BRT, S. R. Harvey, sent a letter, September 30, 1920, to the Santa Fe's Eastern and Western Line General Managers complaining of the use of train porters; the Santa Fe responded that it would not replace train porters with brakemen because the train porters performed additional duties which would be distatesful to the brakemen. The BRT protested the use of train porters in Case No. 2167 to the Train Service Board for the Western Region in June, 1926; in Award 2126, the protest was denied. The BRT protested the use of train porters in Case No. 2359 to the Train Service Board in November, 1926; in Award 2336, the protest was denied. The General Chairman for the BRT, H. W. Gross, sent a series of letters to the Santa Fe in 1932, proposing negotiations for the consolidation of the seniority of brakemen and train porters on all divisions of Santa Fe's Eastern and Western Lines; the Santa Fe responded that it would not negotiate such a consolidation because the BRT did not represent the train porters and because the request of the BRT amounted to nothing more than a restatement of the protests previously filed with the Train Service Board. The BRT filed a protest in 1939 with the National

Railroad Adjustment Board, First Division, Docket 7400; this protest ultimately resulted in Award No. 19324. On April 20, 1942, the National Railroad Adjustment Board, First Division, sustained the proteset filed by the BRT and in Award 6640 ruled that the front-end braking duties on Santa Fe passenger trains should be performed by brakemen holding seniority as such on the Santa Fe brakemen's seniority roster. Award 6640 was challenged in a series of cases known as the "Hunter Litigation," brought in the United States District Court for the Northern District of Illinois, Eastern Division. The court entered a temporary injunction against the enforcement of Award 6640 on the theory that the train porters did not receive notice of the proceedings. *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 78 F.Supp. 984 (N.D.Ill.1948), *aff'd* 171 F.2d 594 (7th Cir. 1948). A permanent injunction was then entered by the trial court. This was reversed by the Seventh Circuit on the basis that the trial court should have heard evidence on the issue of whether the train porters, as a class, had actual notice of the prior proceedings before the National Railroad Adjustment Board, even though they had not received formal notice. *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951). On August 8, 1958, the trial court remanded the case to the National Railway Adjustment Board. On October 14, 1959, the Board ruled in favor of the BRT in Award 19324, holding that only those train porters with a seniority date prior to April 20, 1942, the date of Award 6640, could continue to work as train porters. Since 1956, approxiely three years prior to Award 19324, the Santa Fe had not hired or promoted any person to the position of train porter. Pursuant to the Railway Labor Act, the Santa Fe was bound by Award 19324 and therefore demoted to chair car attendant all persons with a train porter seniority date subsequent to April 20, 1942.[10]

---

[10] Of the plaintiffs and class members listed in the pretrial order, the following men had a train porter seniority date prior to April 20, 1942: Joe Vernon Sears, Edward Rawlins, Theodore Butler, Luther

The Court notes that there were other efforts by the BRT on behalf of brakemen, involving other railways, to assume braking duties performed by train porters on passenger trains.[11]

We turn now to events occurring after the effective date of Title VII. On February 7, 1965, railroads which included the Santa Fe, represented by the National Railway Labor Conference, and five unions comprising the Employee's National Conference Committee (not including the BSCP, BRT, or ORC&B) ex-

---

Prince, Oscar Alfred Walker, William D. Christopher, Archie N. Jones, Forrest P. Tollett, Earlie Nash, William H. Cheers, Robert H. Garner, Jr., George Guest, Obie F. Hunter, James P. Jackson, Frank C. Knighton, Herbert C. Knighton, marion R. Mitchell, Sherwood Moore, Cecil M. Robinson, Vaughn H. Smith, Baylon K. Thaw, Ray O. Wagner, C. B. Williams, G. L. Williams, Wilborn Williams, and Offie Wimberly. The following men had a train porter seniority date subsequent to April 20, 1942: Albert L. Bennett, Jimmie E. Brown, Bobbie Charles Papin, C. J. Skelton, T. J. White, Elgie Crow, Ellis Johnson, Obie Wright, Thomas H. White, Samuel Marvin Talbert, Jr., John W. Landrum, Lawson C. Spencer, Aubrey A. Robinson, John W. Cole, Charles A. Majors, Jr., Jessie J. Smith, Paul H. Stewart, Carl E. Chester, Raymond I. Wiley, Robert W. Austin, Willie Combs, Leon A. Finley, E. S. Garth, J. R. Garth, John S. Henry, Jr., Robert L. Hollowell, Herbert L. Jenkins, Eugene E. McGaugh, Leroy Preston, Pink Reynolds, Vernon M. Robinson, Levi E. Southall, William Steward and A. L. Woolfolk. Of the foregoing men, most are disability annuitants, retired, or deceased.

[11] See e. g., the "Howard Litigation," *Howard* v. *Thompson*, 72 F.Supp. 695 (E.D.Mo.1947); *Howard* v. *St. Louis-San Francisco Ry. Co.*, 191 F.2d 442 (8th Cir. 1951); *Brotherhood of Railway Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); *Howard* v. *St. Louis-San Francisco Ry. Co.*, 215 F.2d 690 (8th Cir. 1954); and the "Randolph Litigation," *Randolph* v. *Missouri-Kansas-Texas Ry. Co.*, 68 F.Supp. 1007 (W.D.Mo.1946); *Randolph* v. *Missouri-Kansas-Texas Ry. Co.*, 7 F.R.D. 54 (W.D.Mo.1947); *Missouri-Kansas-Texas Ry. Co.* v. *Randolph*, 164 F.2d 4 (8th Cir. 1947); *Randolph* v. *Missouri-Kansas-Texas Ry. Co.*, 78 F.Supp. 727 (W.D.Mo.1948); *Randolph* v. *Missouri-Kansas-Texas Ry. Co.*, 85 F.Supp. 846 (W.D.Mo.1949); *Missouri-Kansas-Texas Ry. Co.* v. *Randolph*, 182 F.2d 996 (8th Cir. 1950); *Wood* v. *Randolph*, 209 F.2d 634 (8th Cir. 1954).

ecuted a mediation agreement in Case No. A-7128. This agreement is commonly referred to as the "Feb. 7 Agreement." A year later on February 8, 1966, the BSCP and the Santa Fe executed an agreement extending the Feb. 7 Agreement, along with agreed-upon interpretations thereof, to plaintiffs and class members, effective February 8, 1966. Those plaintiffs and class members that were covered by the agreement, by its terms, are "chair car attendants of this Company [Santa Fe] whose wages and working conditions are subject to the agreement between this Carrier and the Brotherhood of Sleeping Car Porters." The Feb. 7 agreement protects the employee until death, retirement, resignation, dismissal for cause in accordance with existing agreements, failure to retain or obtain a position available to him in the exercise of his seniority rights, or any period in which he occupies a position not subject to the working agreement. The Feb. 7 agreement established a base of wage protection for those protected employees. The protected employee is guaranteed a certain level of income even if furloughed or employed in a job normally paying a lower level of income. The Feb. 7 agreement also prohibits the Santa Fe from transferring a protected employee from his craft or class to another craft or class on the Santa Fe.

On at least one occasion the BSCP took steps to ensure that Santa Fe followed the Feb. 7 agreement. In a letter dated November 16, 1967, Vice President of the BSCP, T. D. McNeal, objected to Santa Fe offering switchman and other positions to chair car attendants covered by the agreement. The Santa Fe responded by letter, December 19, 1967, that the employees in question had applied for employment as switchmen-brakemen, that they had not been approached by the Santa Fe to cross craft lines, and that they had voluntarily relinquished chair car attendant seniority to accept employement as switchmen-brakemen. The outcome of this correspondence was that the BSCP and Santa Fe negotiated a further agreement permitting Santa Fe to assign protected employees, if qualified, to other jobs on the Santa Fe, including but not limited to

brakemen, switchman, fireman, or clerk. The employees so assigned would retain previously accumulated seniority as chair car attendants and therefore retain their status as protected employees under the Feb. 7 agreement. This extension of the Feb. 7 agreement was finalized between the BSCP and Santa Fe, March 23, 1971.

Testimony of Individual Plaintiffs

Several individual plaintiffs testified by summary of testimony. We note the following as common threads running through their testimony which are relevant to our enquiry:

Train porters and chair car attendants had the same annual physical examination as that given to brakemen and conductors.

A train porters' braking duties took priority over his clean-up duties; the clean-up duties were not performed when the braking duties required extra time.

Upon occasion, some train porters would assume the conductor's function when the conductor was drunk or otherwise unable to work, and would also on occasion be asked by a Train Master to watch over a new conductor while he was learning his duties. [Edward Rawlins, Luther Prince, William D. Christopher].

Plaintiffs and class members, all of whom have worked as train porters, feel and felt themselves qualified by their train porter experience to assume the duties of yardman or freight or passenger brakeman. Although non-passenger train brakemen had duties in addition to those of a passenger train porter, these additional brakemen duties were not difficult to learn, in the opinion of plaintiffs. Former train porters who became brakemen had no problem performing their duties as brakeman or brakeman-switchman due to their past experience and knowledge. [Jimmie E. Brown, Bobbie Charles Papin, Ellis Johnson, Samuel Marvin Talbert, Jr.].

EASTERN AND WESTERN LINES OF THE SANTA FE RAILWAY CO.,

EMPLOYMENT OF BRAKEMEN AND CONDUCTORS

BRAKEMEN

YEAR	ALL RACES EAST-ERN	ALL RACES WEST-ERN	ALL RACES TOTAL	NEGRO EAST-ERN	NEGRO WEST-ERN	NEGRO TOTAL	PERCENT NEGRO	SB N*	TOTALS LESS SILSBEE ALL RACE	TOTALS LESS SILSBEE NEGRO	PERCENT NEGRO
1965	2469	2452	4921	0	56	56	1.1379	56	4865	0	0
1966	2478	2047	4525	0	65	65	1.4364	65	4460	5	0
1967	2478	2081	4559	0	74	74	1.6237	69	4490	5	.1113
1968	2280	2136	4416	1	92	93	2.1059	76	4340	23	.5299
1969	2373	2245	4618	7	109	116	2.5119	75	4543	31	.6823
1970	2248	2145	4393	6	115	121	2.7543	82	4311	41	.9510
1971	2814	2198	5012	11	121	132	2.6336	82	4930	50	1.0141
1972	2745	2115	4860	17	144	161	3.3127	79	4781	82	1.7151
1973	2861	2576	5437	48	212	260	4.7820	84	5353	186	3.4746
1974	2640	2522	5162	58	191	249	4.8237	84	5078	165	3.2493
1975	2361	2355	4716	65	183	248	5.2586	86	4630	162	3.4989
1976	2251	2198	4449	73	169	242	5.4394	89	4360	153	3.5091
					CONDUCTORS						
1965	1061	1092	2153	0	4	4	.1857	4	2149	0	0
1966	1072	956	2028	0	17	17	.8382	17	2011	0	0
1967	1047	967	2014	0	27	27	1.3406	27	1987	0	0
1968	988	1062	2050	0	34	34	1.6585	34	2016	0	0
1969	1000	1213	2213	0	36	36	1.6267	36	2177	0	0
1970	1070	1236	2306	0	50	50	2.1682	48	2258	2	.0885
1971	1020	1214	2234	0	57	57	2.5514	48	2186	9	.4117
1972	1023	1239	2262	0	64	64	2.8293	54	2208	10	.4529
1973	1031	1281	2312	0	65	65	2.8114	55	2257	10	.4430
1974	1005	1514	2519	0	69	69	2.7391	55	2464	14	.5681
1975	943	1530	2473	0	73	73	2.9518	56	2417	17	.7033
1976	944	1472	2416	0	90	90	3.7251	63	2353	27	1.1474

Note: Data for 1973 were recorded in March; for all other years the month record is July.

[1] Brakeman and conductor jobs were white jobs, while train porter and chair car attendant jobs were black jobs. As far as many plaintiffs and class members knew, the first black brakemen were Bobbie Charles Papin in 1968 and Leroy Beeson in 1969.[12]

Some plaintiffs and class members applied for brakeman positions after the effective date of Title VII. Common experiences of these applicants were being told that the applicant ws too old [T. J. White, Joe Vernon Sears, Oscar Alfred Walker], being told that the applicant would have to give up all previous seniority as train porter or chair car attendant and begin at the bottom of the brakeman seniority roster [C. J. Skelton, Sears, Walker], being told that Santa Fe was not taking applications [Elgie Crow, Thomas H. White], in an application made before Title VII being told that black men couldn't be brakemen [William D. Christopher], or being told that Award 19324 would not allow it [Crow] (Award 19324 was most com-

---

[12] There is expert testimony that in the regions from which the Santa Fe would probably draw its employees, black males would constitute 9.2% of the relevant labor market in 1965, defined as males 25 years of age or over with a high school education and up to three years of college. Defendants challenge this, and state that the Court should not consider any statistical evidence. They allege that the statistics offered by plaintiff as to employment of black brakemen and conductors on the Santa Fe are invalid under *Hazelwood School District* v. *United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), stating that the proper group of employees to examine is the active class members rather than all black brakemen, that the black male population of the regions served by the railroad possessing a high school education is not the proper labor pool, and that the statistics are incomplete. A prima facie case of pattern or practice discrimination may of course be established by statistics alone. *Hazelwood, supra.* However, we do not rely on statistics to hold that plaintiffs have made out a prima facie case of discrimination. *See* text, *infra.* The Supreme Court has indicated that statistics come in infinite variety and that their usefulness depends on all of the surrounding facts and circumstances. *Teamsters,* 431 U.S. at 339, 97 S.Ct. at 1856, 52 L.Ed.2d at 418. We need accept neither plaintiffs' statistics nor defendants' challenges to those statistics to conclude, as we do, that for all the years before Title VII and for several years after Title VII, there were few or no black brakemen and conductors. The statistics merely indicate the point in time at which the railroad began employing blacks as brakemen and conductors, thereby buttressing plaintiffs' contention that they were not so employed until well after the effective date of Title VII, which in turn supports their contention that they were discriminated against on the basis of race.

monly referred to, however, in connection with a chair car attendant's request to assume train porter duties). At least one plaintiff who was told he was too old for the position was subsequently asked by the Santa Fe to transfer to a brakeman posion [T. J. White]. Other plaintiffs and class members testified that they did not apply for brakeman positions because they knew of these experiences of others and felt that there was no point in applying to be a brakeman [Talbert, Johnson, Thomas H. White]. Others refused to apply for or accept a brakeman position because they would have had to forfeit train porter and chair car attendant seniority [Sears, Rawlins, Skelton]. One plaintiff testified that after a Santa Fe official saw him looking at an equal opportunity poster which was posted in a Santa Fe office in 1967 or 1968, the poster was no longer on the wall. [Skelton].

During all periods in question, brakemen or switchmen-brakemen were regularly hired by Santa Fe and Santa Fe regularly promoted brakemen to conductor. These positions were always open even in periods of force reduction due to resignation, death, disability, or promotion of the Santa Fe brakemen or conductors.

Plaintiffs and class members are of the opinion that age would have been no bar to their employement as brakemen and conductors, for they were already experienced as brakemen, and white men as old as they or older were performing the duties of brakemen and conductors.

Certain plaintiffs and class members were either transferred by Santa Fe on its own initiative or after application by the respective employee to brakeman and other positions; these transfers generally taking place after 1971. [Johnson, T. J. White]. Bobbie Charles Papin was the first black brakeman on the Santa Fe Eastern Lines, and he was transferred on his own application in 1968 to the position of brakeman. Mr. Papin testified that he wore all white clothing to work his first day as switchman-brakeman, because he was afraid of the possibility he could be hurt if someone might "accidentially" not see him.

During the 1940's and 1950's, Santa Fe filled some head-end braking positions with employees known as brakemen-baggagement. These employees were white. Train porters could not bid for brakemen-baggagemen positions, nor could brakemen-baggagemen bid for train porter positions, although they performed the same braking duties.

A few plaintiffs and class members applied for membership in the BRT, feeling that such union membership would aid their quest to obtain brakeman positions. Of these, at least one, Edward Rawlins, was told that the BRT could not represent him as he was a train porter already represented by the BSCP. Elgie Crow was also refused BRT membership. However, one such attempt was successful. Luther Price applied for BRT membership in 1964 and was accepted. The local BRT, through J. M. Phillips, General Chairman of the BRT, helped Prince protect his front-end braking position on Santa Fe passenger trains. Four other train porters were also accepted for BRT membership. in correspondence with Santa Fe, 1964-65, Mr. Phillips maintained the position that these five men were protected as trainmen by the BRT, although Santa Fe took the position that the BRT could not represent these train porters. The BRT prevailed, and in the 1968 agreement between the BRT and the Santa Fe, Schedule of Pay, Rules and Regulations governing Santa Fe trainmen, four of the men, L. T. Prince, O. Wimberly, C. M. Robinson, and J. W. Shelby, are listed as porter-brakemen who would retain rights to regular head-end passenger assignments in their respective seniority districts.

The black Silsbee, Texas brakemen formed a BRT lodge on July 11, 1965. The BRT thereafter, in August 1965, requested the Santa Fe to allow the Silsbee brakemen the opportunity for promotion to conductor. The Santa Fe, in a letter dated August 31, 1965, agreed that black trainmen at Silsbee would be afforded that opportunity. The procedure was to be that the Silsbee trainmen would be contacted in order of seniority and afforded an opportunity to pass the written and oral examination for

conductor. Each trainman would have the opportunity to waive such examination, and in addition, if the examination was taken and failed, the employee's seniority as trainman would not be affected. This procedure may be contrasted to the general contract between BRT and Santa Fe, covering white brakemen, which required that the brakeman take the conductor's exam within three years of becoming a brakeman, no waiver being permitted, and upon twice failing the exam, the brakeman would be dismissed or assigned to other service. However, as to any black trainman employed at Silsbee after August 31, 1965, the Santa Fe stated that such trainman would be required to pass the conductor examination under the usual terms, with no waiver being permitted.

Excluding the deceased, retired, and disability annuitants, the possible active class members at the date of trial and their occupations are as follows:

Name	Craft or Classification
Elgie Crow	Brakeman and conductor
A.M. Bennett	Brakeman and conductor
A.L. Woolfolk	Brakeman and conductor
T.C. Luckey	Brakeman and conductor
Raymond I. Wiley	Brakeman and conductor
Bobbie C. Papin	Flagman (restricted to flagman on passenger service)
Carl E. Chester	Fireman and oiler laborer
Samuel M. Talbert, Jr.	Locomotive Fireman and Locomotive Engineer
Herbert L. Jenkins	Librarian
Archie N. Jones	Security guard
Lawson C. Spencer	Business Car chef-porter
Criscell Kemp	Receiving benefits under Feb. 7 Agreement

W. W. Seymour	Brakeman on leave of absence since October 21, 1971 from Santa Fe to perform services as International Secretary-Treasurer of BSCP
A. L. Bennett	Employed by Amtrak since May 1, 1974 as chair car attendant
Forrest P. Tollett	Employed by Amtrak since May 1, 1974 as chair car attendant
Earlie Nash	Employed by Amtrak since May 1, 1974

Neither the UTU nor the BSCP represent the craft or class of fireman, oilers and laborer, locomotive engineer, librarian, security guard, or business car chef-porter.

All other plaintiffs and class members are retired, deceased, or disability annuitants.

Effective May 1, 1971, the Santa Fe discontinued passenger service. Effective May 1, 1974, all non-operational personnel on passenger trains operated by Amtrak on Santa Fe lines became employees of Amtrak; all operational personnel remained employees of the Santa Fe.

THE LAW

42 U.S.C. § 2000e-2 provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[2] The plaintiff in a Title VII case is required to establish a prima facie case of discrimination. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Since plaintiffs here have alleged a systemwide pattern or practice of discrimination, they must establish more than the "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." They must establish that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice," and of a "repeated, routine, or of a generalized nature." *Teamsters,* 431 U.S. at 336, and n. 16. "The basic framework in a pattern-or-practice suit . . . under Title VII of the Civil Rights Act is the same as that in any other lawsuit. The plaintiff has the burden of proving a prima facie case; if it does so, the burden of rebutting that case shifts to the defendant." *Hazelwood School District* v. *United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (Stevens, J., dissenting). "At the initial, 'liability' stage of a pattern or practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed." *Teamsters,* 431 U.S. at 360, 97 S.Ct. at 1867, 52 L.Ed.2d at 430.

[3] There can be no question that Santa Fe, except for the Silsbee District, deliberately segregated whites into brakeman and conductor positions and blacks into chair car attendant and train porter positions. There can be no question that this segregation was approved by, acquiesced in, and maintained and demanded by the "white" unions. The evidence is clear. For almost all the years of the Twentieth Century to date, there

have been no black brakemen, no white train porters. Both positions required the performance of substantially similar braking duties; the difference in additional duties is insignificant compared to the similarity of total duties. The fact is that employees performing essentially the same duties were segregated into job categary by race, and the evidence is overwhelming that such segregation was intentional. This is disparate treatment.

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
>
> . . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory. . . .

Teamsters, 431 U.S. at 335, 97 S.Ct. at 1854, 52 L.Ed.2d at 415, n. 15.

[4] Defendants urge, however, that Title VII is prospective rather than retrospective, citing *Teamsters* and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). They state that the discriminatory conduct, if any, was the segregated hiring, that the last such hiring took place in 1956, before the effective date of Title VII, and that therefore plaintiffs have not made out a prima facie case of post-Act discrimination. The Court disagrees. In the first place,

we have here the situation described in *Teamsters* where pre-Act conduct has a discriminatory post-Act impact. Furthermore, we also are concerned with post-Act conduct in the alleged discriminatory refusal to transfer or promote plaintiffs to brakeman positions after the effective date of the Act.

In *McDonnell Douglas Corp., supra,* the Supreme Court found a prima facie case of discrimination by disparate treatment when the plaintiff showed:

> (i) that he belongs to a racial minority; (ii that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677. The Court in *Teamsters* said that the criteria used in *McDonnell Douglas* did not purport to be "an inflexible formulation," and that the facts and criteria would vary from case to case. 431 U.S. at 357, 97 S.Ct. at 1865, 52 L.Ed.2d at 429.

The Court has examined the facts here. We note at the outset that since we are concerned with liability, not remedy, at this stage of the proceedings, the ability of an individual plaintiff to perform brakeman's duties is not at issue. Every plaintiff at one time performed braking duties. Certain braking positions required additional duties, but those plaintiffs who performed such additional duties testified that their prior experience enabled them to quickly learn such duties. Brakemen and train porters took the same Rules Examinations and student trips. We therefore hold, for purposes of establishing class-wide liability, that the plaintiff class was qualified for promotion or transfer to brakemen's positions, by virtue of past experience. *See Love* v. *Pullman Company,* 569 F.2d 1074 (10th Cir. 1978), where the Tenth Circuit Court of Appeals made a similar finding for porters-in-charge and train conductors.

Summing up the evidence of disparate treatment, in accordance with the summation in *McDonnell Douglas Corp.*, we find that no black brakeman was appointed on Santa Fe, outside the Silsbee, Texas Seniority District, until 1967 or 1968, well after the effective date of Title VII, and that the Santa Fe's appointment of black brakemen did not accelerate until approximately 1970-71. We further find that no member of the plaintiff class was transferred to a brakeman's position until 1968, well after the effective date of Title VII, and that most such transfers were not made until approximately 1971. From the testimony of the individual plaintiffs, we find a general willingness and desire on the part of the plaintiff class for transfer to brakeman's positions, beginning at least as of the effective date of Title VII. We find that that desire and willingness was in several instances communicated to the Santa Fe, and infer from the evidence before us that the defendant Santa Fe was aware that black chair car attendants and train porters as a class were desirous of becoming brakemen and conductors. We find that throughout the period between 1965 and the present, brakemen positions regularly became vacant and were filled, notwithstanding the general cutback in services and personnel undergone by the Santa Fe. We find that Plaintiffs as a class were qualified to fill these positions. We find that plaintiffs as a class were not transferred to these postions, at least not for several years after the effective date of Title VII,[13] and that the positions were filled by persons who, if lacking prior braking experience, were not as qualified as plaintiffs.

These findings, in the Court's view, establish post-Act disparate treatment of plaintiffs as a class.

---

[13]We note, as defendants urge, that at the present, 50% of the active class members, or 8 of 16, are employed by the Santa FE in brakeman, conductor, flagman, fireman, and engineer capacities. We also note as plaintiffs urge, that these employees did not assume these functions for several years after the passage of the Act, and that comparatively more class members never assumed comparable functions.

However, defendants urge that this action should be governed by *United Air Lines, Inc.* v.*Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) [*Evans],* rather than by *Teamsters,* and that *Evans* requires that we dismiss this action for failure to prove a continuing violation. *Evans* and *Teamsters* are companion cases; both were decided May 31, 1977. In *Evans,* a stewardess complained that her employer's previous no-marriage policy, under which she had been terminated and which was subsequently declared invalid, resulted in a denial to her, after her reinstatement, of her seniority accrued before she was terminated. She had not filed an EEOC complaint based on her termination. After her reinstatement, she filed an EEOC complaint alleging that the denial to her of past seniority was a continuing violation of Title VII. As to that, the Supreme Court said:

> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation.

431 U.S. at 558, 97 S.Ct. at 1889, 52 L.Ed.2d at 578-79.

The Court also said that her wrongful termination, since it was not the basis for a timely charge with the EEOC, "is the legal equivalent of a discriminatory act which occurred before the statute [Title VII] was passed." *Id.*

In *Teamsters,* by contrast, the defendant employer had, on a class-wide basis, separated employees into white and minority jobs. Black and Spanish-surnamed employees were primarily

assigned to the lower paying city driver positions, with some whites also so assigned, while only whites were assigned to line or over-the-road driver positions. Such a segregation occurred both pre- and post-Act. The Supreme Court found a systematic pattern or practice of discrimination in the segregation. As to the post-Act discriminatees, the Court ordered full "make whole" relief under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). As to the pre-Act discriminatees, the Court found that they too had stated a cause of action under Title VII, because the seniority system used by the employer, by which seniority could not be transferred from city to line driver positions, perpetuated the effect of pre-Act discrimination. The Court used a disparate impact theory in discussing this issue, saying:

> One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs, supra:* "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

401 U.S. at 430, 28 L.Ed.2d 158, 91 S.Ct. 849.

> . . . [T]he seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This

> disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." *Ibid.*

Teamsters, 431 U.S. at 349, 97 S.Ct. at 1861, 52 L.Ed.2d at 424. The Supreme Court then went on to hold that though the seniority system had an adverse impact under *Griggs,* it was validated, in effect, by § 703(h) of Title VII, which exempts bona fide seniority systems from the operation of Title VII.

We are of the opinion and so hold that this case falls within the rationale of *Teamsters* rather than of *Evans.* The pre-Act discriminatory job segregation is the statuts quo which is frozen by the operation of the Santa Fe seniority system, under which seniority cannot be transferred from train porter to brakeman positions. Like *Teamsters,* the seniority system operates within a seniority division. See *Teamsters,* 431 U.S. at 342, 97 S.Ct. at 1858, 52 L.Ed.2d at 420 n. 26. The seniority system is not neutral in its operation, as was the case in *Evans. Teamsters* provides a cause of action to these plaintiffs on a theory of disparate impact of the seniority system.[14] Plaintiffs have made out a prima facie case of discrimination by disparate impact of the seniority system as it applies to them, since it operates to freeze them into the positions to which they were assigned by the employer's pre-Act discrimination, and since it operates to deprive them of the "allocation ofthe choicest jobs, the greatest protection against layoffs, and other advantages . ." *Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1862, 52 L.Ed.2d at 424.

---

[14]We have examined cases cited by defendants in support of their assertion that *Evans* governs. The factual situations in several of these cases were more like *Evans* than *Teamsters,* and the cases are inapplicable. *DeGraffenreid* v. *General Motors Assembly Div.,* 558 F.2d 480 (8th Cir. 1977); *Martin* v. *Georgia-Pacific Corp.,* 568 F.2d 58 (8th Cir. 1977); *Freude* v. *Bell Telephone Company of Pennsylvania,* 438 F.Supp. 1059 (E.D.Pa. 1977). In *Acha* v. *Beame,* 438 F.Supp. 70 (S.D.N.Y. 1977), the court said that "*Teamsters* held that a Title VII violation may not be premised upon discriminatory acts which occur-

The evidence supports the plaintiffs' position of discrimination against them by defendants on the basis of race. Defendants seek to overcome plaintiffs' prima facie evidence on two theories. First, as to disparate impact, defendants assert that the seniority system is bona fide under § 703(h) of the Act. We disagree with this assertion. Second, as to disparate treatment, defendants assert that they were required to act as they did by provisions of labor contracts and the Railway Labor Act. Atlthough these provide a reason for defendants' conduct, they do not excuse defendants' discrimination against individual plaintiffs, as we will hereafter outline. We will discuss defendants' theories seriatim.

THE SENIORITY SYSTEM

42 U.S.C. § 2000-2 [§ 703(h) of Title VII] provides in pertinent part:

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

The Supreme Court dealt with the issue of what was meant by a bona fide seniority system in the *Teamsters* case. The Court rejected the view that a seniority system is invalid merely because it perpetuates the effects of past discrimination. In interpreting § 703(h) of Title VII, the Court stated;

---

red before the effective date of Title VII even though a present seniority system perpetuates the effect of pre-Title VII discrimination." 438 F.Supp. at 76. We disagree with the *Acha* court's interpretation of *Teamsters;* our interpretation is that a Title VII violation may be so premised if the seniority system in question is not bona fide. In sum we disagree with cases cited by defendant on this issue.

> In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative hisory shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352, 97 S.Ct. at 1863, 52 L.Ed.2d at 426. However, the Corut recognized "the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." 431 U.S. at 346, 97 S.Ct. at 1860, 52 L.Ed.2d at 422 n. 28. The Court stated the criteria of a bona fide system as follows:

> The seniority system in this case is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-sur-named Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with NLRB precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniourity to pre-Act discriminatees does not make it unlawful.

431 U.S. at 355, 97 S.Ct. at 1865, 52 L.Ed.2d at 427-28.

The criteria have been considered by a few courts. In *Croker* v. *Boeing Co. (Vertol Div.)*, 437 F.Supp. 1138, 1187 (E.D.Penn. 1977), the court said:

> In this case, the plaintiff's evidence in no way establishes that Boeing Vertol's job family system is other than bona fide and facially neutral . . . The plaintiffs presented no evidence to show that creation of the job family system in 1956 was intended to preserve discriminatory patterns of employment. To the extent the restrictions of the job family system lock employees in undesirable jobs, the system affects blacks and whites in such jobs equally. Consequently, the job family system is not itself unlawful under Title VII.

In *Chrapliwy* v. *Uniroyal, Inc.*, 15 E.P.D. ¶ 7933 (N.D.Ind.1977), the court held a seniority system unlawful because it had its genesis in discrimination.

> [B]efore the passage of the Act, Uniroyal ". . . kept segregated seniority lists according to sex . . ." [Citations omitted]. From 1965 through 1970 it was found that the A-B system of employment was only a disguise to the former segregated system. Finally, from 1970 to the presen., this court found that the classification of certain jobs as those which "should not be performed by females" unlwfully discriminates on the basis of sex. In short, it is clear that the employment system at Uniroyal has had as its genesis discriminatory conduct both before and after passage of the Act.

The court in *Southbridge Plastics Division, Etc.* v. *Local 759, Etc.*, 565 F.2d 913, 916 (5th Cir. 1978) said "*Teamsters* holds that absent a showing of discriminatory purpose in a seniority system, that system is protected by § 703(h) from attack on other Title VII grounds."

One of the most detailed analyses of this issue is found in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 351-52 (5th Cir. 1977):

> As we read the *Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide . . . The Court's analysis suggests that the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue . . . In *Teamsters* the Court focused on four factors:
>
> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system had its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose.

The Court analyzed the context in which the seniority system developed. In discussing the relationship of seniority units to bargaining units, the Court quoted a National Labor Relations Board opinion that emphasized the rationality of separate bargaining units in the case of over-the-road and city drivers "where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests." [431 U.S. at 356, 97 S.Ct. at 1865, 52 L.Ed.2d at 428 n. 42]. Thus, the facts of a particular seniority unit are critical to a determination whether the system is bona fide; and a case-by-case analysis of seniority systems in light of section 703(h) is necessary.

The *Stockham Valves* court expressed dissatisfaction with the district court's finding that the seniority system was bona fide. The appellate court directed the lower court on remand to pay particular attention to the facts indicating that the seniority system had its genesis and was negotiated and maintained in discriminatory conditions and that the seniority units did not reflect existing separate and distinct bargaining units.

We have analyzed the seniority system in this case according to the criteria as listed in *Teamsters* and analyzed by *Stockham Valves,* and conclude that the seniority system is not bona fide.

Since for the most part conductors achieve that position in a progression from a brakeman position, our main concern is with the seniority system for brakemen, and our discussion will center around that system. Brakeman seniority begins as of the day the employee is qualified as a brakeman, and is accumulated within a seniority district and is not transferable from one seniority district to another, nor is seniority in another craft transferable to a brakeman position, except that a conductor continues to accumulate brakeman as well as conductor seniority. It is important that we distinguish, between this seniority system *per se* and the segregation of employees into different crafts. That segregation is the deliberate historic exclusion of black men from the trainment crafts of brakeman and conductor. *Teamsters* makes it clear that the brakeman seniority system is not unlawful under § 703(h) merely because it perpetuates pre-Act exclusion and segregation. Out concern is with whether an intent to discriminate entered into the adoption and maintenance of the seniority system, not with whether an intent to discriminate entered into the segregation of employees. The four criteria listed in *Teamsters* must be applied to the seniority system.

First, the seniority system is neutral on its face and applies equally to all brakemen. No transferee to a brakeman position, black or white, would accrue seniority any differently than any

other transferee. In this regard, we analyze the present operation of the seniority system, as did the *Teamsters* Court.

Second, the structure of separate crafts or bargaining units is rational, in accord with the industry practice, and consistent with Railway Labor Act [RLA] precedents. The crafts have been recognized by the federal government and its agencies. The separate crafts have separate certified bargaining representatives under the RLA, they are denominated as separate crafts by the National Mediation Board under the RLA, and they were recognized by the United States Government by Supplement No. 12 to General Order 27 in 1918. The separate crafts are in accord with industry practice as the craft structure on the Santa Fe has existed in substantially the same form since the late 1800's and has existed on the other railway lines in the United States. At any rate, this Court cannot impose liability because of the structure of separate crafts, for the separation into two crafts by race is the very discrimination which the *Teamsters* Court said would not, standing alone, invalidate a seniority system.

[5] We determine that the seniority system in question does not meet the third and fourth criteria. The seniority system had its genesis in racial discrimination and was created and maintained with illegal purpose. The defendants argue that the seniority system was first established in 1892 and that the position of train porter was not created until 1899, so the seniority system would not have had its genesis in racial discrimination against train porters. They argue that the seniority system has been in continuous effect in substantially the same form from 1892 to the present time. Defendants assert that this historical evidence indicates that the seniority system was created and maintained to offer job security and economic protection. In the Court's opinion, this argument goes to the first factor in the *Teamsters* analysis, that the seniority system is neutral on its face. We have already held that it is neutral. We must look to other facts to determine the nature of the genesis and

maintenance of the seniority system. The *Stockham Valves* court has considered this issue.

> The seniority system at Stockham was adopted in a collective bargaining agreement in 1949, when segregation in the South was standard operating procedure. The history of the negotiations associated with Stockham's seniority system is clouded. Since 1967 the local union has sought major revisions in the departmental seniority system through contract negotiations with the defendant Stockham. In 1970 the union struck for five months seeking the company's agreement with its proposals, including plant-wide seniority. Stockham's failure to go along with revisions in the seniority system must be evaluated in the context of the company's extensive unlawful employment practices during the period of the negotiations and its intransigent adherence to wide-spread segregated facilities at the plant, at least until 1974.

Here, we have a seniority system which was adopted and maintained during a period when segregation was standard operating procedure on the Santa Fe. The seniority system was created by collective bargaining at a time when there were no black brakemen and no white train porters, at a time when blacks as a class performed only the most menial tasks on the railroad. It would not be until 1918 that "colored men employed as firemen, trainmen, and switchmen [were] paid the same rate of wages as [were] paid white men in the same category," and that only by order of the United States Government. *See* note 4. The unions which maintained the seniority system through negotiations and collective bargaining with the Santa Fe had clauses in their Constitutions which limited membership to white males. This written prohibition of black membership lasted at least from the 1930's to the 1960's, and there were no blacks in the unions before the 1930's. Since blacks were not eligible for membership in the unions, they could not be employed as brakemen or conductors, and they

could not be eligible for the economic protection of the seniority systems in question. It was not until 1950 that chair car attendants had a written seniority system which was established through collective bargaining with the Santa Fe, and the train porters never had a written seniority system at all. The seniority system was used by the unions to deprive blacks of their train porter positions.

In sum, we conclude and so hold that the seniority system had its genesis in racial discrimination and was created and maintained with illegal purpose, that it fails to meet the *Teamsters* test, and that it is not bona fide. It follows that liability may be imposed against the Santa Fe in favor of the plaintiff class members.

[6] We also conclude that liability may be imposed against the UTU. 42 U.S.C. § 2000e-2 provides in pertinent part:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> * * * * * *
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

There was no detailed analysis of this provision in *Teamsters*. The *Teamsters* Court said "[b]ecause the seniority system was protected by § 703(h), the union's conduct in agreeing to and maintaining the system did not violate Title VII." 431 U.S. at 356, 97 S.Ct. at 1865, 52 L.Ed.2d at 428. The courts which have considered the issue say that if the seniority system is not protected by § 703(h), there must be an additional determination of the union's role in agreeing to, maintaining, or otherwise ratifying the seniority system. See *James* v. *Stockham Valves & Fittings Co., supra; United States* v. *East Texas Motor Freight System,* 564 F.2d 179 (5th Cir. 1977). We have made such a determination and conclude that the UTU is properly liable.

The UTU and its predecessors play a principal role in the creation and maintenance of the seniority systems through collective bargaining between themselves and the Santa Fe. There is no indication in the facts that this collective bargaining was at less than arms length or that Santa Fe controlled the resulting labor agreements, and thus the UTU and its predecessors were equally responsible for the resulting seniority system. In addition to their role in collective bargaining, the unions were also involved in some of the conduct which led the Court to conclude that the seniority system as invalid, most notably the creation of the Constitutions which excluded blacks from union membership. We conclude that the unions' role in creating, maintaining, and otherwise ratifying the seniority system was at least as great as Santa Fe's role, and that therefore liability is properly imposed upon the UTU under Title VII.

POST-ACT DISCRIMINATION

We have stated that plaintiffs have made out a prima facie case of post-Act discrimination against them as a class under the standards of *McDonnell Douglas Corp.* v. *Green, supra.* Defendants may rebut this by meeting their burden "to articulate some legitimate, nondiscriminatory reason" for their conduct in not transferring and promoting plaintiffs. If defendants present the Court with such a reason, plaintiffs may show that defendant's stated reason for not transferring and promoting them was pretext. *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 678 and 679. Defendants point to the Feb. 7 agreement as a legitimate nondiscriminatory reason for the Santa Fe's failure to unilaterally transfer the plaintiff class to other positions for which they were as a class qualified. The Court has analyzed the Feb. 7 agreement and agrees with defendants. We further find no pretext. However, we find that the Santa Fe may be liable to individual plaintiffs for a discriminatory refusal to transfer them in situations where the Feb. 7 agreement was not applicable.

[7] The Feb. 7 agreement is legitimate. Congress has throughout the years created a number of structures and systems governing numerous facets of labor relations. One such structure, Title VII, is designed to prohibit and eliminate racial and other discrimination in employment, while the RLA is one of the structures designed to promote the orderly management of labor through collective bargaining. Both purposes are important, and neither statute repeals the other. The relation between the two kinds of employment statutes has been addressed in a number of cases. In *Southbridge Plastics, supra,* the employer brought an action pursuant to the Labor Management Relations Act [LMRA] seeking a declaratory jdugment that a conciliation agreement it had entered into with the EEOC overrode any contradictory provisions contained in a collective bargaining agreement with the union; the union counterclaimed seeking arbitration. The district court found the conciliation binding; on appeal the Fifth Circuit reversed. In so doing, the court quoted with approval from *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), amended and modified on other grounds, 556 F.2d 758 (5th Cir. 1977):

> We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important policies also emanate from the NLRB [National Labor Relations Act], among them the principle that terms and conditions of employment are to be shaped by the employer and the exclusive bargaining representatives of its employees.

The same principles apply to the RLA as to the LMRA and the NLRA. See *United States* v. *St. Louis-San Francisco Railway Co.*, 52 F.R.D. 276 (E.D.Mo.1971); *Norman* v. *Missouri-Pacific Railroad Co.*, 414 F.2d 73 (8th Cir. 1969). The collective bargaining provisions of the RLA are not invalidated by Title VII.

It was the BSCP, the exclusive bargaining representative of plaintiffs, which entered into the Feb. 7 agreement which for-

bade the Santa Fe to unilaterially transfer employees covered by the agreement, which included most if not all of the plaintiff class members. The agreement is not discriminatory on its face, nor is there any evidence that the intent of the BSCP in entering into the agreement was discriminatory. On the contrary, the evidence is that the intent was to ensure that plaintiffs would not be arbitrarily deprived of their jobs by their employer. Furthermore, once it became apparent that certain employees covered by the Feb. 7 agreement were seeking transfers to other positions, the BSCP and the Santa Fe negotiated to extend, and did extend, the agreement to permit the transfer of qualified employees covered by the agreement without any loss by them of the protection of the Feb. 7 agreement. This collective bargaining is important under and is protected by the RLA. We refuse to find that Title VII required defendant Santa Fe to act in contravention of the agreement, and therefore hold that the Feb. 7 agreement is a legitimate nondiscriminatory reason for Santa Fe's failure to unilaterally transfer or promote the plaintiff class members to the brakeman positions for which they were as a class qualified. We further hold that the Santa Fe followed the terms of the agreement because it was required to by the RLA, and not as a pretext. In light of the protest by the BSCP of the voluntary transfer of two of its members, we believe that the BSCP, certified bargaining representative of the plaintiff class, would have vehemently protested any attempt by the Santa Fe to violate the Feb. 7 agreement. There is no pretext in such a situation.

However, there is testimony of discriminatory conduct by the Santa Fe in situations not covered by the Feb. 7 agreement. The Feb. 7 agreement did not prohibit any plaintiff from transferring to another position nor prohibit the Santa Fe from permitting such a voluntary transfer. It appears to the Cot that the Santa Fe showed great reluctance to transfer or promote the black train porters and chair car attendants who affirmatively sought such transfer. The individual testimony of plaintiffs in-

cludes a number of instances where a plaintiff expressed interest in voluntary transfer to another position, only to be met by evasion, rejection, or refusal on the part of the Santa Fe, with a number of reasons given for refusal ranging from Award 19324 to the Feb. 7 agreement to the plaintiff's age to the plaintiff's lack of BRT membership to the seniority that the plaintiff would have to give up. In every case, the Santa Fe refused, directly or indirectly, to transfer or promote black chair car attendants and train porters. This conduct, being outside the Feb. 7 agreement, cannot be excused by it. The prima facie case of post-Act discrimination has not been rebutted as to this conduct of the Santa Fe. Therefore, those individual plaintiffs who suffered this post-Act discriminatory conduct have a basis of liability in addition to the invalidity of the seniority system. The Supreme Court in *Teamsters* affirmed the holding of *Franks* v. *Bowman Transportation Co., supra,* that "'' 703(h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination . . ." and that "[p]ost-Act discriminates . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks* v. *Bowman, supra,* without attacking the legality of the seniority system as applied to them." 431 U.S. at 346, 97 S.Ct. at 1860, 52 L.Ed.2d at 422.

The UTU has no liability for post-Act discriminatory conduct, for it neither had nor exercised any hiring and transfer authority, and therefore did not engage in any employment conduct which affected plaintiffs.

DAMAGES

As noted earlier, the parties agreed that the case be tried in two stages, a liability stage and a damage stage. Because we have found liability on the part of both Santa Fe and the UTU, the case will proceed to the damages stage. To expedite matters, we note the following:

Since Santa Fe has previously settled all claims for damages, back pay, and attorneys' fees with all plaintiffs, there will be no damages or attorneys' fees award against Santa Fe in favor of plaintiffs. Monetary relief and attorneys' fees may be awarded against the UTU, since it has not settled these claims with plaintiffs.

Retroactive seniority may be awarded to plaintiffs, and this remedy may be awarded against the Santa Fe, since the railroad remained a party for purposes of injunctive relief and seniority carryover. Seniority relief may also be awarded against the UTU. Retroactive seniority may not be awarded prior to the effective date of Title VII. *Teamsters, supra; Franks* v. *Bowman Transportation Co., supra. Teamsters* sets out standards under which individual plaintiffs will be eligible for an award of retroactive seniority. Only those plaintiffs who are still actively employed by the SAnta Fe will benefit from an award of retroactive seniority.

We direct that counsel present to the Court within thirty days after receipt of this decision their proposed findings concerning the manner in which the damage and equitable relief issues of the case should be ordered.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action
No. W-4963

Joe Vernon Sears, et al, an individual in person and for all other persons similarly situated,

and

The Brotherhood of Sleeping Car Porters,
Plaintiffs,

vs.

The Atchison, Topeka And Santa Fe Railway Company and United Transportation Union, successor to Brotherhood of Railway Trainmen, a labor organization,
Defendants.

MEMORANDUM AND ORDER

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* [Title VII or the Act]. The action is now in its second or damage stage. The first or liability stage of the action was concluded on June 14, 1978, when the Court rendered a decision in favor of the plaintiff class against the defendants The Atchison, Topeka and Santa Fe Railway Company [Santa Fe] and the United Transportation Union [UTU]. 454 F.Supp. 158 (D. Kan. 1978).

A Summary of the facts and earlier decision is appropriate. The plaintiffs are black male Americans who at any time were employed by Santa Fe as train porters and who have been employed by Santa Fe, in any capacity, during the period from July 2, 1965. Plaintiffs charged the Santa Fe and UTU with discrimination on the basis of race. The Santa Fe settled all claims for damages, back pay, and attorneys' fees with plain-

tiffs, but remained a party for purposes of injuctive relief and seniority carryover. The UTU made no settlement with plaintiffs. The Court determined that the seniority system entered into between the UTU or its predecessors and the Santa Fe was not bona fide under § 703(h) of Title VII, because it had its genesis and was created and maintained in racial discrimination. *International Brotherhood of Teamsters* v. *United States*. 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977) [*Teamsters*]. Liability was therefore properly imposed on a discriminatory impact theory for the perpetuation of past discrimination by the invalid seniority system after the effective date of Title VII. We held that the UTU was equally responsible with the Santa Fe for the creation and maintenance of the invalid seniority system, and that liability could be imposed on the UTU. Monetary relief and attorneys' fees may be awarded against the UTU and the Santa Fe. Seniority relief was also held an appropriate remedy against the Santa Fe for the post-Act discrimination against the plaintiff class. The Court held that the UTU engaged in no post-Act discriminatory conduct against the plaintiffs.

The Court requested briefs from the parties as to how the damage stage of the trial should proceed. We have been fully briefed and are now ready to set out guidelines to expedite matters.

The statute provides for remedies in 42 U.S.C. § 2000e-5(g):

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable

> relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The 1972 amendments to Title VII added the provisions which authorized the Court to order affirmative action not limited solely to the enumerated affirmative acts and such other equitable relief as deemed appropriate, and the provisions which set forth the accrual date for back pay.

The remedies of Title VII are equitable in nature. One purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful discrimination." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975). The courts have been armed with full equitable powers to fashion remedies which will achieve this "make whole" purpose. *Id.* Back pay is one such remedy. The Supreme Court stated in *Albemarle* that:

> Back pay has an obvious connection with this purpose [to achieve equality of employment opportunities]. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which

> causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." [citation omitted]
>
> * * *
>
> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. . . .

45 L.Ed.2d at 296-97, 298-99. However, a back pay award is not punitive in nature, but equitable, intended to restore the recipients to their rightful economic status. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismd.* 404 U.S. 1006, 30 L.Ed.2d 655, 92 S.Ct. 573, *cert. dismd.* 404 U.S. 1007, 30 L.Ed.2d 655, 92 S.Ct. 651. It follows that plaintiffs must show actual financial loss before they are entitled to back pay. *See generally United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364 (5th Cir. 1974). In some situations, courts have made a determination of financial loss on a class-wide basis. To justify such an award, plaintiffs proved that there was a class whose members suffered economic loss as a result of discrimination; such proof established a *prima facie* claim to back pay for each member of the class. *United Transp. U. Loc. No. 974* v. *Norfolk & W. Ry.* 532 F.2d 336 (4th Cir. 1975); *Johnson* v. *Goodyear Tire & Rubber Co., Synthetic Rubber Plant, supra.*

An award of back seniority is another equitable remedy which may be necessary to achieve the "make whole" purpose of the act. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 47 L.Ed.2d 444, 96 S.Ct. 1251 (1976); *Teamsters.* As with back

pay, an award of seniority relief should generally be made "unless there exist reasons for denying relief ' 'which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination. . . and making persons whole for injuries suffered.' ' " *Teamsters.* 52 L.Ed.2d at 433, quoting *Franks* which quoted *Albermarle.* The seniority award should be that which will slot the victim in that position in the seniority system that would have been his had he been hired or transferred at the time of his application or at the time he would have applied but for the discriminatory practices. *Franks,* 47 L.Ed.2d at 462; *Teamsters,* 52 L.Ed.2d at 438.

The Court notes that a plaintiff who suffered only pre-Act discrimination is of course not entitled to relief, for Title VII is not retroactive. *See Teamsters,* 52 L.Ed.2d at 428. No person may be given retroactive seniority to a date earlier than the effective date of the Act, *id.,* or back pay for periods earlier than that time.

As we have remarked, there are two different sorts of discrimination at issue here. First, there is the discriminatory impact of the invalid seniority system. This impact is upon those class members who performed braking duties but did not accrue brakeman seniority, i.e., persons employed as train porters. Liability for this discriminatory impact is properly imposed upon both the UTU and the Santa Fe, the UTU being liable for back pay, damages, and attorneys' fees and both being liable for back seniority. Second, there is the discriminatory treatment by the Santa Fe after the effective date of the Act in refusing to transfer or promote class members. Liability for this discriminatory treatment is properly imposed only upon the Santa Fe, and back seniority is the only remaining remedy.

There are also two different groups or subclasses of class members, those who were serving as train porters when Title VII went into effect in 1965 and those who have been demoted to chair car attendants at an earlier date. As we discussed in the

first stage of this opinion, all class members with a seniority date after April 20, 1942, were precluded from serving as train porters after 1959 by virtue of Award 19324. These class members were chair car attendants thereafter. They were not performing braking duties as of the effective date of Title VII. Since these class members were not performing braking duties, they had no right to accumulate brakemen seniority, and the invalid seniority system had no discriminatory impact upon them as of the effective date of the Act. Whether or not the events culminating in Award 19324 constituted discrimination on the part of the UTU and its predecessors is irrelevant because pre-Act discrimination does not entitle a victim to relief under the Act. *Teamsters, supra.* The only compensable discrimination suffered by those persons employed as chair car attendants as of July 2, 1965 was perpetrated by the Santa Fe, not the UTU. This group of plaintiffs is not entitled to an award of back pay against the UTU, but only to a grant of seniority. We will discuss further how such a grant is to be awarded.

The second group of plaintiffs is those persons who had a seniority date prior to April 20, 1942, remained train porters, and were entitled to perform braking duties as of the effective date of Title VII. The invalid seniority system therefore had a discriminatory impact upon them. Under *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971), such a practice which perpetuates the effects of prior discrimination is violative of Title VII. Unlike the result in *Teamsters,* the seniority system here is invalid, and therefore the perpetuation of past discrimination by it is the basis of imposing liability against the UTU. These persons are therefore entitled to back pay and attorneys fees from the UTU as well as seniority relief as to both defendants.

Subclass Of Train Porters

As we noted, those class members serving as train porters as of 1965 are entitled to back pay since they were damaged by the invalid seniority system. The back pay is what each would have received had he been employed as a brakeman. The Court found previously that train porters and brakemen received the same mileage rate or hourly rate on passenger trains, but that brakemen on passenger trains received additional compensation such as pay in connection with delays, so that the total wages paid to a brakeman on a passenger train were higher than those paid to a train porter. Also, brakemen on other types of trains received other compensation. A back pay award to a plaintiff would be an award of the difference in a train porter's and a brakeman's total compensation. Such an award would be in essence a monetary realization of the fact that the plaintiff should have been employed as a brakeman because he should have been able to acrue brakeman's seniority for performing brakeman's duties, but was unable to do so because of the invalid seniority system.

The Supreme Court has said that seniority may not be awarded prior to the effective date of Title VII. *Teamsters.* Since any back pay award in this action is derived from a determination that the plaintiff should have had brakeman's seniority, an award of back pay is tied to the date such seniority should have begun to accrue. This cannot be before July 2, 1965. Plaintiffs urge that each class member should be deemed to have had some 15 years of brakeman's seniority as of July 2, 1965, so as to be placed in his "rightful place." This we cannot do, for to grant back pay as though the class member had several years of past seniority would be to award seniority prior to the effective date of Title VII. However, we do determine that *all* members of this subclass are presumptively entitled to accrue brakeman's

seniority and pay as of July 2, 1965, since plaintiff Sears filed his EEOC complaint less than two years later.[1]

A class-wide entitlement is appropriate for the following reasons. First, all members of the train porter subclass received less than brakemen, so that there is a class-wide harm. Second, the situation of the subclass is unlike the situation in *Teamsters,* for these men did not need to transfer to other positions in order to eliminate the discrimination they suffered. This is not a situation of disparate treatment that may or may not have been suffered by an individual, but an instance where all have suffered disparate impact.

We will require, of course, that the amount of back pay due be determined on an individual basis, since this is an equitable award designed to put each into the place he would have been. The Court considers that the use of averages may be appropriate. The 10th Circuit Court of Appeals in *Love* v. *The Pullmen Co.,* 569 F.2d 1074, 1977 (10th Cir. 1978), a case decided after *Teamsters,* approved the Colorado U. S. District Court's use of averages in fixing back pay awards for porters-in-charge who performed conductors' work without conductors' compensations:

> Each member of the class was harmed. There was no showing under *Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, that any member of the

---

[1] Back pay may not accrue prior to two years of filing with the EEOC. 42 U.S.C. § 2000e-5(g). This may not be earlier than the effective date of Title VII. All persons in the class will be entitled to the same starting date, even though some may not have filed complaints with the EEOC or filed complaints at a later time than the named plaintiff Joe Vernon Sears, since in a class action it is not required that every plaintiff exhaust administrative remedies. See *Albemarle, supra n. 8.* We see no reason to decertify the class, as the UTU suggests, since to do so would only deprive plaintiffs of this protection and of the presumptions they are entitled to as a result of our finding that defendants are liable for violating the Act.

> class would have received less under the combined classification [merging seniority rosters of porters-in-charge and conductors]. Under these circumstances, and in view of the impossibility of reconstructing the relationship of the members in the combined classification, and relating to the available runs, the use of averages derived from the separate classifications is a reasonable basis for a back-pay formula. *See Stewart* v. *General Motors Corp.*, 542 F.2d 445 (7th Cir.); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir.); and *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 21[illegible]h Cir.).

As plaintiffs note, the holdings in *Sabala* and *Pettway,* insofar as they conflict with *Teamsters* by deciding that seniority systems which perpetuate prior discrimination are without more invalid, are overruled, but are still relevant insofar as they discuss remedies under Title VII. We have no problem in stating that averages may be used when there is an invalid seniority system. We think averages may be appropriate because, as plaintiffs point out, it would be difficult to determine at this late date what each subclass members would have done in terms of making bids for positions. The chain of events cannot be reconstructed. By using averages, those high-paying and those low-paying positions will be combined. We feel plaintiffs stated it well in their Response Brief, note 9:

> . . . Some brakemen might select shorter trips so as not to be away from home as much as those who selected longer trips. Other brakemen might select work on passenger trains while still others would remain in the freight service. As to any particular train porter, the assumption that he might exercise his seniority in the same manner as the white brakeman with whom he is compared [in the defendants' method of calculation] could either be unfair to the train porter or unfair to the UTU. In addition, going back and creating the exact condition that existed with respect to each and every possible opening that

> might have been available to a train porter after the effective date of Title VII could be impractical. The Plaintiffs believe that an equitable adjustment of these conflicting and competing claims is achieved by using averages which take into account those white brakemen who may have earned more because of their particular selection of jobs as well as the wages of those white brakemen who selected the lower paying jobs.

Also, there would be no need to determine when particular vacancies occurred. As we stated in our earlier Memorandum and Decision, p. 21, brakemen and conductor positions were always open in periods of force reduction due to resignation, death, disability, or promotion of the Santa Fe brakemen or conductors. We think these class members are entitled to presume that there would have been opportunities for them to bid their seniority the same as white brakemen with similar seniority.

The period of time in which these class members are enetitled to back pay is that period from 1965 on until they were no longer capable of performing an active day's work. This may be evidenced by each's termination, retirement, or disability date. This evidence should be produced by each plaintiff, and may be rebutted by defendants.

We therefore tentatively propose the following formula, to be applied to each class member:

1) Determine the average compensation paid a white brakemen with seniority as of July 2, 1965, until the date the plaintiff could no longer work.

2) Subtract the actual compensation paid the class member.

3) Subtract the amount received by the class member from the Santa Fe.

4) Add interest at the legal rate from July 2, 1965.

The Court is not aware that any member of this subclass is still actively employed by the Santa Fe. However, an active subclass member would be entitled to an award of brakeman seniority as of July 2, 1965, rather than as of the date he did or would have applied for transfer, since this damage award deems that he accrued such seniority from and after July 2, 1965. An award of front pay, a monetary award calculated to terminate the date a victim of discrimination attains an opportunity to move to his "rightful place," is inappropriate except fro active subclass members. *Cf. James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977).

Subclass Of Chair Car Attendants

The Court has already stated that those class members employed as chair car attendants as of the effective date of the Act are not entitled to back pay from the UTU. An additional reason for this holding is that any back pay award would be in effect a determination that the class member is entitled to seniority for braking duties performed before 1965, and under *Teamsters,* as we said, we cannot make such a determination. The Santa Fe has settled all claims for back pay arising in connection with awards of seniority for post-Act discrimination. The only remedy available to these class members is an award of brakeman seniority. This seniority is only available to those class members still actively employed, since only the would benefit from it.

In accordance with *Teamsters,* PART III, we will distinguish between subclass members who applied for transfer and/or promotion and those who did not.

Applicants

The Supreme Court discussed presumptions which could be applied in situations where discrimination victims had made some application:

> As was true of the particular facts in Franks [v. Bowman, *supra*], and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking.
>
> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in Franks, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. *Teamsters,* 52 L.Ed.2d 431-32.

The Court explained the reasons behind the evidentiary scheme:

> The holding in Franks that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. [citations omitted] These factors were present in Franks. Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or prac-

> tice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process. *Teamsters n. 45.*

This Court found a pattern or practice of discrimination on the part of the Santa Fe. As we stated in our earlier Memorandum and Order, June 14, 1978, at 27, we found no appointment of black brakemen on the Santa Fe, outside the Silsbee District, until well after the effective date of Title VII, although plaintiffs as a class were desirous of such appointments, as the Santa Fe knew, and although there were regular vacancies to which plaintiffs could have been appointed and for which they were as a class qualified.

Individual chair car attendant plaintiffs who were not transferred to brakmen positions when they first applied are entitled to the presumption that the Santa Fe's action in not transferring them was discriminatory. This presumption may be rebutted by the Santa Fe, as the Supreme Court stated in *Teamsters.* To meet his burden of proof, each plaintiff must show:

1) The date he applied for a transfer or promotion;

2) He was physically qualified for the job of brakeman. This may be shown by submitting evidence that he performed another job for the Santa Fe requiring physical activity.

Plaintiffs who prove these two elements are entitled to the following presumptions which we applied to the class in our June Memorandum and Order:

1) That he was able to perform the job functions of a brakeman, since he had done so in the past;

2) That a vacancy for a brakeman existed at the time of his application, since vacancies regularly occurred and were filled.

We will not require that plaintiffs who actually applied for a transfer prove that they would have resigned their February 7th Agreement protection and their seniority as chair car attendants, for the evidence has been that plaintiffs knew that they would lose these benefits upon transferring to brakeman positions, as this was a characteristic of the craft seniority systems of the railroad. By applying for brakeman positions, they indicated a willingness to give up February 7th Agreement protection and chair car attendant seniority.

Plaintiffs who applied for and were transferred to brakemen positions, but wish to show that they would have applied at an earlier date but for the Santa Fe's discriminatory practices, will be required to prove the elements of proof for those who made no application, as to that earlier date.

Nonapplicants

Chair car attendant nonapplicants may be entitled to relief.

> [A]n incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority. Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly. *Teamsters,* 52 L.Ed.2d at 433.

Teamsters goes on to discuss that difficult burden:

> A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by

> the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. [citations omitted] When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the presumption discussed in Part III-A, *supra*. 52 L.Ed.2d at 435.
>
> * * *
>
> The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them. It does not show which of the nonapplicants actually wanted such jobs, or which possessed the requisitie qualifications . . . . 52 L.Ed.2d at 436.

A plaintiff's current willingness to transfer into a brakeman position does not confirm his past desire for the job:

> A willingness to accept the job security and bidding power afforded by retroactive seniority says little about what choice an employee would have made had he previously been given the opportunity freely to choose a starting line-driver job. While it may be true that many of the nonapplicant employees desired and would have applied for line-driver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each specific individual . . . . 52 L.Ed.2d at 437.
>
> * * *
>
> To the extent that an incumbent was deterred from applying by his desire to retain his competitive seniority, he simply did not want a line-driver job requiring him to start at the bottom of the "board." Those nonapplicants who did not apply for transfer because they were unwilling to give up their previously acquired senioirty suffered only

> from a lawful deterrent imposed on all employees regardless of race or ethnicity. The non-applicant's remedy in such cases is limited solely to the relief, if any, to which he may be entitled because of the discrimination he encountered at a time when he wanted to take a starting line-driver job. *Teamsters, n. 56.*

The Court has considered whether nonapplicants should be required to prove that they would have given up their February 7th Agreement protection and chair car attendant seniority, and would have been willing to start at the bottom of the brakeman seniority board. Plaintiffs assert that such a requirement would be giving effect to the invalid seniority system by making a class member prove he would have been willing to have gone to work under that seniority system, and that such a requirement would therefore perpetuate the effects of past discrimination. We must reject this argument. First, this subclass of chair car attendant plaintiffs, since not employed as train porters as of the effective date of the Act, did not suffer the discriminatory impact of the seniority system. As we noted earlier, these plaintiffs performed braking duties before, not after, the effective date of the Act, and are not entitled to relief for injuries suffered in that earlier period. These plaintiffs were in the same position as other employees of the railroad, i.e., they would have had to give up the seniority in one craft to transfer to another. They were not in the same position as the subclass of train porters, who did not accrue brakemen's seniority though they performed brakemen's duties. Second, this subclass of plaintiffs was bound by the terms of the February 7th Agreement. As the Court noted in the June Memorandum and Order, the Feburary 7th Agreement was valid, entered into between plaintiffs' union and plaintiffs' employer, and was binding upon them. Chair car attendants had benefits and protections under the February 7th Agreement, but until March 1971, could not voluntarily transfer to another position with the Santa Fe without losing their seniority as chair car attendants. Title VII does not give this Court the

authority to change the terms of the Agreement under these circumstances. *Cf. Southbridge Plastics Division, Etc.* v. *Local 759, Etc.*, 565 F.2d 913 (5th Cir. 1978), where an earlier collective bargaining contract took precedence over a conciliation agreement entered into with the EEOC pursuant to Title VII. These plaintiffs, therefore must show to the satisfaction of the Court that they would have been willing, prior to March 23, 1971, to give up chair car attendant seniority and the protections of the February 7th Agreement, and that they would have been willing to start at the bottom of the brakemen seniority roster.

To meet his burden of proof, each plaintiff must show:

1) He would have applied for the job of brakeman with the Santa Fe, being willing

a) to give up the protections of the February 7th Agreement between February 8, 1966 and March 23, 1971,

b) to resign his seniority as a chair car attendant prior to March 23, 1971, and

c) to begin at the bottom of the brakeman seniority roster;

2) The date he would have applied for the job of brakeman under these conditions;

3) He was physically qualified for the job of brakeman. This may be shown by submitting evidence that he performed another job for the Santa Fe requiring physical activity.

Plaintiffs who prove these three elements are entitled to the following presumptions which we applied to the class in our June Memorandum and Order.

1) That he was able to perform the job functions of a brakeman, since he had done so in the past;

2) That a vacancy for a brakeman existed at the time of his application, since vacancies regularly occurred and were filled.

Applicant and nonapplicant chair car attendants who show these required elements set out above will have shown that they were actual victims of discrimination, entitled to the relief that will as nearly as possible, "recreate the conditions and relationships that would have been had there been no unlawful discrimination. *Teamsters,* 52 L.Ed.2d at 438. This will be an award of retroactive seniority from the date each would have or did apply for transfer or promotion.

CONCLUSION

Our guidelines for the damage stage of this trial may be summarized as follows:

The class has not been decertified. For purposes of determining remedies, it will be divided into two subclasses, plaintiffs with a seniority date prior to April 20, 1942, who remained train porters, and plaintiffs with a seniority date after April 20, 1942, who were demoted to chair car attendants.

We find Santa Fe has no financial liability to any plaintiff, having settled all monetary claims. Santa Fe does, however, have the responsibility to adjust its seniority system if required under guidelines as follows:

1) All persons in the train porter subclass, if still active, are entitled to brakeman seniority as of the effective date of Title VII.

2) All persons in the chair car attendant subclass, if still active, are entitled to prove that each would have become a brakeman but for the discrimination of the Santa Fe.

3) To make such proof, each applicant must show:

a) the date he applied for transfer or promotion; and

b) that he was physically qualified for the job.

4) To make such proof, each nonapplicant must show:

a) he would have applied for transfer or promotion, being willing to give up his February 7 Agreement protection and his chair car attendant seniority, and would have been willing to begin at the bottom of the brakeman seniority roster;

b) the date he would have applied for transfer or promotion under these conditions; and

c) that he was physically qualified for the job.

5) Each subclass member meeting the requirements of 3) or 4) is entitled to the presumptions.

a) that he was able to perform the job functions of a brakeman; and

b) that a vacancy for a brakeman existed at the relevant time.

The UTU also have to adjust seniority lists as set out herein.

The UTU is liable for appropriate attorneys' fees and for any additional monetary loss suffered by the train porter subclass members over and above the Santa Fe settlement when, if and as established in accordance with the following formula:

1) Determine the average compensation paid a white brakeman with seniority as of July 2, 1965, until the date the subclass member could no longer work;

2) Subtract the actual compensation paid the class member;

3) Subtract the amount received by the class member from the Santa Fe; and

4) Ad interest at the legal rate from July 2, 1965.

The Court will not appoint a special master to make remedy computations, feeling such to be unnecessary. These matters should be obtainable by Santa Fe from its records, and there are not a large number of persons involved.

This Memorandum is designed to apprise the parties and their counsel of the Court's intentions as to remedies. To expedite the remedial stage of this action, we order that this matter be set down for hearing on January 2, 1979 at 1:30 P.M. at Wichita, Kansas.

IT IS SO ORDERED.

At Wichita, Kansas this *23rd* day of October, 1978.

Wesley E. Brown
United States District Judge

Supplemental Brief

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, etc., *et al.*,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM SITZER
J. DENNIS O'LEARY
OF COUNSEL DUBAIL, JUDGE,
KILKER, O'LEARY & SMITH
One Mercantile Center, Suite 3210
St. Louis, Missouri 63101
(314) 241-4261
Attorneys for Petitioner

November 24, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF AUTHORITIES

	Page
Fusari v. Steinberg, 419 U.S. 379 (1975)	2
Sears v. Atchison, Topeka and Santa Fe Railway Company, 645 F.2d 1365 (10th Cir. 1981)	2,3
Taylor v. Mueller Company, 26 F.E.P. Cases 1695 (6th Cir., 1981)	1,2,3
Teamsters v. United States, 431 U.S. 324 (1977)	2,3

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO
BROTHERHOOD OF RAILROAD TRAINMEN,
a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, etc., *et al.*,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

This supplemental brief is submitted by petitioner in support of its petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. It is presented, in accordance with Rule 22 (6) of this Court, in order to call this Court's attention to the very recent decision of the United States Court of Appeals for the Sixth Circuit, *Taylor* v. *Mueller Company*, 26 F.E.P. Cases 1695 (6th Cir. 1981). It is presented because "counsel have a continuing duty to inform the court of any

development which may conceivably affect the outcome" of the case. *Fusari* v. *Steinberg*, 419 US 379, 391 (1975) (Chief Justice Burger, concurring).

Taylor deals with the bona fides of a seniority system under Title VII of the Civil Rights Act, 42 USC Sec. 2000e et sec. This is one of the questions presented for review in this petition for writ of certiorari. It deals with the important federal question considered by this Court in *Teamsters* v. *United States*, 431 US 324 (1977). It is also in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit, the court below, in *Sears* v. *Atchison, Topeka and Santa Fe Railway Company*, 645 F2d 1365 (10th Cir. 1981).

Specifically, the Sixth Circuit in *Taylor* was willing to consider the rationale for the existence of separate crafts. *Taylor*, 26 F.E.P. Cases at 1700. The Tenth Circuit was unwilling to do this. *Sears*, 645 F2d at 1372-74.

The Sixth Circuit states, in *Taylor* at 1700:

> "The fact that the seniority system was adopted at a time when Mueller Company practiced racial discrimination in its employment practices does not establish that the system had its genesis in racial discrimination."

The Tenth Circuit, in *Sears* at 1373-74, states that the seniority system *did have* it genesis in racial discrimination merely because the crafts were established in the late 1800's when segregation was the standard operating procedure on the Santa Fe. It totally disregards the historical crafts established on the nation's railroads. The Tenth Circuit states, 645 F2d at 1373-74:

> "The third factor mentioned in *Teamsters* is whether the seniority system had its genesis in racial discrimination. The brakemen's system was established in 1892, before the creation of the porter or chair car attendant crafts, in a 'period when segregation was the standard operation pro-

> cedure on the Santa Fe'. 454 F.Supp at 180. In this context the seniority system for brakemen may have originated without conscious regard to race, but the same may not be said of the later established of the black-only crafts."

The train porter craft (black) was created by Santa Fe in 1899, sixty five years before the Civil Rights Act. The seniority system for brakemen (white) was established seven years earlier, in 1892. Id at 1369.

The Sixth Circuit has followed *Teamsters* in its recent decision in *Taylor*. The Tenth Circuit's decision in *Sears* is in conflict with the Sixth Circuit's decision in *Taylor*, and further, is contrary to this Court's decision in *Teamsters*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

William Sitzer
J. Dennis O'Leary
Of Counsel Dubail, Judge, Kilker,
O'Leary & Smith
One Mercantile Center
Suite 3210
St. Louis, Missouri 63101
(314) 241-4261
Attorneys for Petitioner

November 24, 1981

Opposition

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS

No. 81-221

In the Supreme Court of the United States

October Term, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN,
a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHESTER I. LEWIS
2202 E. 17th
Wichita, Kansas 67214
Counsel of Record for Respondents The Brotherhood of Sleeping Car Porters, Criscel Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey, and W. W. Seymour

TERRY G. PAUP
111 West Douglas
Suite 790
Wichita, Kansas 67202
Counsel of Record for Respondent Joe Vernon Sears and all remaining named Respondents other than The Atchison, Topeka & Santa Fe Railway Company
and
LEE H. WOODARD
833 North Waco
Wichita, Kansas 67203

October 2, 1981

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. REASONS FOR DENYING THE PETITION 8

A. The Decision of the Court Below Is Consistent With This Court's Ruling in *Teamsters* and *Griggs v. Duke Power Company* 8

B. The Decision of the Court Below Does Not Conflict With a Decision of Another Federal Court of Appeals 12

C. The Decision Below Does Not Raise a Significant Question Concerning Union Liability 13

III. CONCLUSION 15

Citations

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11

Bremer v. St. Louis Southwestern Railroad Company, 310 F.Supp. 1333 (E.D. Mo. 1969) 11

Brotherhood of Trainmen v. Howard, 343 U.S. 768 (1952) 10

Conley v. Gibson, 355 U.S. 41 (1957) 10

Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) 9

Griggs v. Duke Power Company, 401 U.S. 424 (1971) 8, 9

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) 11

Howard v. Thompson, 72 F.Supp. 695 (E.D. Mo. 1947) 2, 10

Hunter v. Atchison, T. & S. F. Ry. Co., 78 F.Supp. 984 (N.D. Ill. 1948), 171 F.2d 594 (7th Cir. 1948), 188 F.2d 294 (7th Cir. 1951) 5

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 8, 9

Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975) 13

Lewis v. Tobacco Worker's International Union, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 12

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 13

Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969) 11

Reyes v. Missouri-Kansas-Texas Railroad Company, 53 F.R.D. 293 (D. Kan. 1971) 11

Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944) 10

Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980), *cert. granted*, 101 S.Ct. 1972 .....13, 14

United States v. St. Louis-San Francisco Ry. Co., 52 F.R.D. 276 (E.D. Mo. 1971), *rev'd on other grounds*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) 11

STATUTES

42 U.S.C. §2000e-2(c) 13

42 U.S.C. §2000e-2(h) (§703(h) of the Act) 8, 9, 11

ADMINISTRATIVE DECISIONS

Case No. 2167, Award 2126, Train Service Board for the Western Region 4

Case No. 2359, Award 2336, Train Service Board for the Western Region 4

Case No. 7400, Award 6640, National Railroad Board of Adjustment, First Division 5

Case No. 36265, Award 19324, National Railroad Board of Adjustment, First Division 4, 5

Case No. A-7128, Mediation Agreement, National Mediation Board of Adjustment ("Feb. 7 Agreement") 7

No. 81-221

In the Supreme Court of the United States

October Term, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN,
a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

On the Sante Fe, as well as on most railroads, all brakemen were white and all train porters were black. Santa Fe has never had a white train porter and first employed a black brakeman on its Eastern Lines, which covered seven states, in 1968. When the Civil Rights Act of 1964 ("the Act") became effective, Santa Fe did not employ any black brakemen on its Western Lines outside of the Silsbee, Texas, seniority district, a small historical Santa Fe anomaly. Full crew laws effectively prohibited train porters or black employees from performing braking duties

in Santa Fe's Coast Lines before the Act became effective. Santa Fe did not have a black conductor in its entire system outside of Silsbee until 1970.

Historically, the qualifications for black train porters and white brakemen were the same. Both had to take the same Book of Rules Examination, satisfactorily pass the same physical examination and take student trips. They also had to meet the same continuing physical requirements and they performed substantially the same braking duties except that train porters worked exclusively at the head-end of passenger trains. White freight brakemen received a higher mileage rate than paid to train porters and although white rear-end passenger brakemen and train porters were paid the same mileage rate, the white brakemen received higher total wages due to being paid extra compensation and benefits that were not received by the black train porters.

Petitioner's predecessors, the BRT and ORC&B, were always white organizations. No later than 1939, an express requirement that all BRT members had to be "white" males was incorporated into its Constitution and the ORC&B had a similar "white" only clause in its Constitution as early as 1934. At least one court found that in states where such restrictive clauses were prohibited by law, the BRT maintained a purely white membership through the use of a blackball system. *Howard v. Thompson*, 72 F.Supp. 695 (E.D. Mo. 1947). The racial clause was not dropped from the BRT Constitution until 1960 and it remained a part of the ORC&B Constitution until 1966.

The BSCP, in separate proceedings, was certified to represent chaircar attendants and train porters on April 5, 1946. However, the BSCP was never able to negotiate a contract with Santa Fe that covered substantive rules and working conditions for train porters.

In 1892, the BRT and the predecessor to the ORC&B negotiated the first known contract with Santa Fe containing seniority provisions for brakemen. The BRT and ORC&B separately negotiated and renegotiated such contracts with Santa Fe on numerous occasions during the pre-Act years. These contracts provided for competitive seniority which controlled the acquisition of braking jobs, layoffs, etc. The BRT and ORC&B contracts were also dovetailed and tailored to one another. When taken together, they historically mandated the promotion of a stated number of brakemen to conductor on the basis of seniority in their seniority district. The contracts also required such promotion within a specified period as a conditon of contnued service. Further, both pre-Act and post-Act ORC&B and BRT contracts provided that a brakeman could not be promoted to conductor unless he worked for a specific length of time in the freight service. Thus, a white line of job progression was established and maintained as Santa Fe's white conductors came from the ranks of its brakemen who were all white.

During the pre-Act era, a black line of job progression was established between a chaircar attendant's job and a train porter's position. A chaircar attendant's job was the usual entry level for a train porter, however, a train porter could not be promoted to a conductor's job despite the fact he was as qualified for that position as a white brakeman and may have had substantially more experience performing braking duties.

In the 1920's, the BRT commenced efforts to obtain the braking jobs performed by black train porters for its own white brakemen. In doing so, the BRT did not seek both the job and the black man performing it, but instead merely wanted the job for its own entirely white membership. In a letter dated September 30, 1920, a BRT official

wrote Santa Fe stating that passenger train head-end braking jobs were ". . . held by negro porters who are performing all the duties and receiving the wages of brakemen" and asking that ". . . future vacancies in this service . . . be filled by white brakemen . . .". Santa Fe denied this request. In 1926 and 1927, the BRT filed two protests concerning Santa Fe's use of train porters with the Train Service Board for the Western Region which was the body composed under federal law to hear such claims.[1] Both protests were based upon the seniority provisions of the BRT contracts with Santa Fe. Specifically, the BRT claimed that allowing black train porters to perform braking duties violated the seniority system for white brakemen as only employees with brakemen seniority were to perform braking duties and the train porters lacked such seniority. In 1926, the same year as one of the BRT protests, the BRT negotiated a new contract with the Santa Fe containing seniority provisions. Both protests were denied by the Board. In the later proceedings that resulted in Award 19324, the BRT admitted that the protests were filed with the purpose ". . . that the Train Porters should be eliminated and Brakemen used in their stead . . .".

In the 1930's the BRT proposed a consolidation of seniority for brakemen and train porters in Santa Fe's Eastern and Western Lines. In doing so, a BRT official stated that train porters were "brakemen in every sense of the word". Such merger of "black seniority" with "white seniority" had been used on other railroads by the BRT and other unions to eliminate black employees through the use of collateral contractual provisions which had the effect of restricting future employment of blacks. A year

---

1. Case No. 2167, Award 2126 and Case No. 2359, Award 2336, Train Service Board for the Western Region.

before this proposal, the BRT at its 1931 National Convention adopted a resolution calling for the removal of negro porter-brakemen. Indeed, a consolidation such as proposed by the exclusively white BRT would have resulted in many black train porters being immediately replaced by white brakemen. Santa Fe again rejected the BRT demands.

In 1939, the BRT commenced proceedings before the National Railroad Adjustment Board, First Division, claiming that Santa Fe's use of train porters to perform front-end braking services on passenger trains violated the seniority provisions of its contract with the Santa Fe. In May 1944, the Board entered Award 6640 in favor of the BRT. The Award was temporarily enjoined in *Hunter v. Atchison, T. & S. F. Ry. Co.*, 78 F.Supp. 984 (N.D. Ill. 1948). This was affirmed on appeal, 171 F.2d 594 (7th Cir. 1948). In its opinion, the Circuit Court stated ". . . that the Award under attack does not directly take the work from the porters and give it to the brakemen, but the effect is precisely the same as though the Award had done so in express terms . . .". *Id.* at 597-598. Following additional proceedings in the District Court and another appeal,[2] the case lay dormant until August 8, 1958, when the District Court remanded the case to the Board. On October 14, 1959, the Board entered Award 19324 which prohibited all train porters with a seniority date after April 20, 1942, from performing braking duties on Santa Fe's passenger trains. Following this decision, all train porters who did not have the required seniority date were demoted to chair-car attendants. None of them, regardless of seniority date, were given the opportunity to be a brakeman even though they had been performing braking duties for a number of years. The BRT and ORC&B were still exclusively white organizations at this time.

---

2. *Hunter v. Atchison, T. & S. F. Ry. Co.*, (7th Cir. 1948); 188 F.2d 294 (7th Cir. 1951).

During the pre-Act years, the BRT also attacked the railroad jobs held by black employees on other railroads. These attacks included the use of administrative proceedings, negotiation of contractual provisions having the effect of reducing the employment of blacks in certain jobs, threats of strike and other coercive action.[3] At this time, the BRT was negotiating and renegotiating contracts containing seniority provisions with the Santa Fe.

The pre-Act brakemen in the Silsbee seniority district in Santa Fe's Western Lines were exclusively black while the conductors in that district were white. This was true despite the fact that the seniority systems established by the BRT and ORC&B contracts with Santa Fe required progression from brakeman to conductor and even though the BRT, as the certified labor representative for Santa Fe brakemen, was obligated to insure that all brakemen were entitled to the protection and advantages of these contracts.

The brakemen's seniority system operated to perpetuate the strict racial lines of progression that historically existed on the Santa Fe into the post-Act era. The seniority system did not allow a train porter to transfer or carry over seniority, including seniority accumulated while performing braking duties, to a brakeman's job. Thus, under the brakemen's seniority system actual braking experience was ignored and a black train porter who transferred to a brakeman's job had to start at the bottom of the roster like any inexperienced newly hired brakeman. This meant he would have to work off the switchman's extra board, the lowest job in the white line of racial progression, filling in for switchmen who were ill or on vacation.

---

3. Examples of some of the BRT discriminatory attacks can be found in the District Court's Memorandum of Decision, 454 F.Supp. at 169, n.11.

Consequently, he would not have had a regular job nor have been able to initially earn a full year's wages. He also would have been among the first subject to layoff. Thus, despite extensive braking experience, he would have been faced with not only having to take the lowest paying braking job, but also with the risks that accompany a significant loss of job security. Most train porters were unwilling to accept these risks. As a result, the same senority system that was used to deprive train porters of their braking duties prior to the Act also operated to deny them the opportunity to perform the same work during the post-Act years.

The seniority systems for Santa Fe brakemen and conductors also combined to preclude opportunity for a train porter to become a conductor since promotion to that position required seniority as a brakeman in the freight service. Thus, even when given an opportunity for transfer, a black train porter could not use his braking experience as the basis for promotion. Consequently, Santa Fe did not have even a single black conductor in its entire system outside of the Silsbee seniority district until 1970.

The Feb. 7 agreement, made applicable to Santa Fe chaircar attendants seven months after the Act became effective, did not alter the situation. That agreement only proscribed Santa Fe's unilateral involuntary transfer of chaircar attendants to other jobs, but neither limited equal opportunity nor access to another Santa Fe position nor prohibited the voluntary transfer by chaircar attendants in the event they desired a brakeman's job. The Agreement did not deny the right to transfer or carry over seniority to a brakeman's job. It was the brakeman's seniority system that did. Likewise, it was the seniority system for brakemen and conductors, not the Feb. 7 Agreement, that prevented train porters from being promoted

to conductors. Thus, opportunity for promotion was restricted by the post-Act racially disparate impact of the same seniority systems that had been historically used to maintain the racial lines between black train porters and white brakemen, *i.e.* the brakemen's and conductor's seniority systems.

II. REASONS FOR DENYING THE PETITION

A. The Decision of the Court Below Is Consistent With This Court's Ruling in *Teamsters* and *Griggs v. Duke Power Company*

The District Court and the Court of Appeals for the Tenth Circuit found that Santa Fe train porters were victims of pre-Act discrimination and that the brakemen's seniority system operated to perpetuate this discrimination into the post-Act years by maintaining the strict racial lines of progression that had been previously established on the Santa Fe. The courts below also found that the seniority system was not "bona fide" within the meaning of §703(h) of the Act and that Santa Fe, petitioner and its predecessor unions were all responsible for its creation, use and maintenance. Based on these findings, liability was imposed upon the petitioner.

This Court has ruled that ". . . (u)nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Company*, 401 U.S. 424, 430 (1971). The principle of *Griggs* is applicable to a non-bona fide seniority system as it is not protected under 703(h) of the Act. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 349-350, 353 (1977).

The petitioner fails to address *Griggs* or directly discuss liability under the principle of racially disparate impact even though that principle is the basis for the decision below. Instead, petitioner claims the only consideration relevant to liability is that Santa Fe, rather than petitioner's predecessors, hired black employees to fill chaircar attendant and train porter jobs. Petitioner relies upon *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), contending *Franks* holds that in cases such as this the wrong upon which liability is established is discriminatory hiring. This ignores *Griggs* and is a misconception of the ruling in *Franks*. Although §703(h) was considered in *Franks*, this Court only decided that it did not bar an award of retroactive seniority to job applicants seeking relief from an employer's post-Act hiring discrimination. 424 U.S. at 761; *see also Teamsters*, 431 U.S. at 346. *Franks* simply is not in point on the fundamental liability issues.

There is little question that the brakeman's seniority system had a racially discriminatory post-Act impact upon respondents and their fellow class members by perpetuating pre-Act discrimination into the post-Act years. Consequently, the remaining primary issues are whether the seniority system is bona fide within the meaning of §703(h) and, if not, is the petitioner liable under the Act for the proven discriminatory racial impact caused by the seniority system.

In resolving the issue of whether the seniority system was bona fide, the courts below looked to the totality of facts and circumstances surrounding the seniority system, its historical maintenance and use as well as the manner of its post-Act operation. The undeniable proof established that the hostile patterns and practices by petitioner's predecessors were racially premised. The BRT made pre-

Act demands that Santa Fe braking duties historically performed by black train porters be given to white brakemen. At the same time it refused union membership to black train porters or other black railroad employees and failed to represent the black Silsbee brakemen contrary to its duty as the bargaining representative for Santa Fe brakemen. The BRT discriminatory demands soon reached the level of discriminatory attacks based upon the brakemen's seniority system. Petitioner claims that these attacks constituted no more than a jurisdictional dispute and "the fact that this operated to the advantage or disadvantage of any particular racial group is simply fortuitous." (Petition at 12). The BRT asserted the same claim and it was rejected by this Court as "unsound" in *Brotherhood of Trainmen v. Howard*, 343 U.S. 768, 773 (1952). In *Howard* and *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944), this Court ruled that the Railway Labor Act did not provide remedies for racial discrimination and held that union practices and actions otherwise lawful could be rendered unlawful if utilized by the union to serve the ends of such discrimination. *See also Conley v. Gibson*, 355 U.S. 41 (1957). In *Howard*, the BRT using threat of strike, coerced the "Frisco" railroad to agree to replace its train porters with white brakemen, and this Court, in rejecting the union claim that such was lawful, stated:

> "As previously noted, these train porters were threatened with the loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name . . . Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. . ."

343 U.S. at 773. (Citations omitted)

In more recent years, the courts have held that neither a railroad company nor a railway union can successfully defend a Title VII case on the proposition that their discriminatory acts were immunized by the Railway Labor Act or that it provides the exclusive remedies for injuries suffered as a result of such discrimination. *Norman v. Missouri Pacific Railroad*, 414 F.2d 73 (8th Cir. 1969); *Reyes v. Missouri-Kansas-Texas Railroad Co.*, 53 F.R.D. 293, 298-99 (D. Kan. 1971); *United States v. St. Louis-San Francisco Ry. Co.*, 52 F.R.D. 276, 278-80 (E.D. Mo. 1971), *rev'd on other grounds*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); *Bremer v. St. Louis Southwestern Railroad Co.*, 310 F.Supp. 1333, 1335-1338 (E.D. Mo. 1969); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 656-58 (5th Cir. 1974).

Unquestionably, the BRT engaged in pre-Act discrimination and used the brakemen's seniority system to further this end. Although the union's pre-Act racial discrimination, just as an employer's pre-Act discrimination, is not actionable, it is relevant to the inquiry of whether a seniority system is bona fide within the meaning of §703 (h). The approach urged by petitioner, based solely upon the fact that Santa Fe hired train porters, would substitute an inflexible mechanical test for an actual inquiry into the facts. In this case, the facts establish pre-Act union discriminatory conduct, patterns and practices which were implemented by the union's use of the brakemen's seniority system that was maintained through contracts negotiated and renegotiated by the union and Santa Fe. Clearly, the decision below, holding that the seniority system was not protected under §703(h), is well founded.

B. The Decision of the Court Below Does Not Conflict With a Decision of Another Federal Court of Appeals

Petitioner claims that the decision below is in conflict with the decision of another Circuit Court of Appeals, but cites only the single case of *Lewis v. Tobacco Worker's International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089. *Lewis* is not in conflict with the decision below; it simply is not in point.

In *Lewis*, the District Court did not find that the employer or union were engaged in actionable post-Act racially discriminatory conduct or that there had been a post-Act perpetuation of past discrimination through an offending practice or procedure. Instead, the District Court based liability upon a finding, *inter alia*, that the company and union had done nothing to dispel a belief, purportedly held by substantial number of black job applicants, and founded upon past discrimination no longer existing, that the company still assigned jobs on a racial basis. The Court of Appeals for the Fourth Circuit reversed, and with respect to the employer, first stated that "(w)e do not think failure of the company to announce innocence is a violation of Title VII." *Id.* at 1143. The Circuit Court next pointed out that the record was also insufficient to support the District Court's factual finding upon which liability was based. Then turning to the claim against the union, the court noted that since the union had nothing to do with hiring the finding of liability as to it was "even more tenuous" *Id.* at 1144. Plainly there is no conflict between *Lewis* and the decision below.

C. The Decision Below Does Not Raise a Significant Question Concerning Union Liability

Union liability for the seniority system is compelled by the facts of this case. 42 U.S.C. §2000e-2(c); *See*: *Kaplan v. International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1360 (9th Cir. 1975); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). During the pre-Act years, the BRT and ORC&B relied upon and used the brakemen's seniority system to deprive black train porters of their jobs. This was an aggressive racially discriminatory use of seniority systems maintained in contracts that were continually negotiated and renegotiated by the BRT and ORC&B. These negotiated seniority systems also insured that promotion to conductor would come from the BRT's white membership and, thus, solidified the white line of job progression. The petitioner and its predecessors were parties to, maintained and relied upon the same seniority systems in the post-Act era. These seniority systems then worked to deny train porters equal opportunity to the post-Act work they were qualified to do and which had been previously taken from them because they were not white. The decision below holding the petitioner liable on the basis that it and its predecessors demanded, acquiesced in, maintained and used the seniority system is clearly sufficient for union liability.

Petitioner, without analysis, also asserts that a writ should be granted simply because this Court has granted certiorari to review the decision in *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), *cert. granted*, 101 S.Ct. 1972. However, this ignores the facts of *Swint*. In *Swint*, when the seniority system was negotiated, the union had a large black membership and blacks were active in the union leadership and had an equal vote in the formulation

of union positions and policies. Such was not the case with the BRT and ORC&B. Further, the seniority system under attack in *Swint* was modified, in certain departments, prior to the effective date of Title VII, to allow carry-over seniority for the purpose of complying with the Act by removing barriers to employment opportunities for black employees. Just the opposite occurred in this case where petitioner insisted that the seniority systems continue to operate as they always did. Clearly, *Swint* is distinguishable from this case where the same unmodified seniority system having a post-Act racially discriminatory impact was actually used as an impotrant vehicle to further the white union hostile and racially premised pre-Act conduct and practices.

Should this Court grant certiorari, the respondents request the Court to direct that the proceedings in the District Court continue pending this Court's decision. Since the Court of Appeals for the Tenth Circuit remanded the case to the District Court to implement its judgment the petitioner has filed Suggestions of Death for approximately one-third of the class members. A great majority of the class members first started working as train porters in the 1930's period and are approaching their last years of life. Thus, these proceedings should not be delayed in the District Court if certiorari is granted, but instead, they should be allowed to continue so that if this Court affirms the decision below, immediate relief may be obtained. Otherwise, there will be an added delay, which may effectively preclude many train porters from ever realizing the remedy to which they were entitled under the Act.

III. CONCLUSION

For the reasons stated, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY G. PAUP
&
LEE H. WOODARD
Attorneys for Respondent Class and all named Class Members except those named below

CHESTER I. LEWIS
Attorney for Respondents Brotherhood of Sleeping Car Porters and Criscel Kemp, A. M. Bennett, A. L. Woolfolk, T. C. Luckey and W. W. Seymour
Attorneys for Respondents

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, etc., *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM SITZER
J. DENNIS O'LEARY
OF COUNSEL DUBAIL, JUDGE, KILKER, O'LEARY & SMITH
One Mercantile Center, Suite 3210
St. Louis, Missouri 63101
(314) 241-4261
Attorneys for Petitioner

October 29, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF AUTHORITIES CITED

Page

Cases:

American Tobacco Company v. Patterson, 80-1199 2

Flight Attendants v. Trans World Airlines, 80-951 1

Griggs v. Duke Power Company, 401 US 424 (1971).... 3

International Brotherhood of Teamsters v. United States, 431 US 324 (1977) 3

Johnson v. Uncle Ben's, Inc., 628 F 2d 419 (5th Cir. 1980) 2

Northwest Airlines, Inc. v. Transport Workers Union of America, 67 L Ed 2nd 750 (1981) 2

Pullman Standard v. Swint, 80-1190 2

Steel Workers v. Swint, 80-1193..... 2

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 1015 S.Ct. 1089, 67 L Ed 2nd 207 (1981) 2

Uncle Ben's, Inc. v. Johnson, 101 S.Ct. 1967, 68 L Ed 2d 290 (1981) 4

Zipes v. Trans World Airlines, 78-1545..... 1

Miscellaneous:

Title VII, 42 USC Sec. 2000e-2(c)..... 3

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TRANSPORTATION UNION, SUCCESSOR TO
BROTHERHOOD OF RAILROAD TRAINMEN,
a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, etc., *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents erroneously claim that the petition to review the decision of the United States Court of Appeals for the 10th Circuit does not raise a significant question under federal statutory law concerning union liability. The nature of the relationship of a labor union as a codefendent in a race discrimination suit in employment is an important federal question already being considered by this Court his term. In *Zipes* v. *Trans World Airlines,* 78-1545 and *Flight Attendents* v. *Trans World Airlines,* 80-951,

this Court is considering the power of a federal district court to approve a settlement of a class action suit negotiated by former employees and the employer, all over the objections of the labor union. Similarily, in this case, Santa Fe settled all damage claims in a court approved class action settlement. Further, the issue of contribution between labor unions and employers in a Title VII context has recently been considered by this Court in *Northwest Airlines, Inc.* v. *Transport Workers Union of America,* 67 LEd 2nd 750 (1981).

Respondents have completely misconstrued the petition for certiorari in claiming that the issue of liability under a disparate impact theory was not addressed. The first question presented by the petition is the liability of petitioner under this theory for the failure of train porters to be hired or promoted where the Santa Fe had and exercised sole authority to hire and promote. The court below used an improper allocation of the burdens of proof as to petitioner in a Title VII case, absolutely contrary to this Court's holding in *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 LEd 2nd 207 (1981). In *Johnson* v. *Uncle Ben's, Inc.,* 628 F2d 419 (5th Cir. 1980), a recent Title VII disparate impact case, the Fifth Circuit failed to consider *Burdine.* This Court remanded the case for further consideration, 101 S.Ct. 1967, 68 LE2d 290 (1981), in light of its opinion in *Burdine.* Similarly, this case should be remanded for reconsideration because *Burdine* was not considered by the Court below. *Burdine* was decided one week before the decision below.

Further, this Court has agreed to hear cases this term involving Title VII liability immunity for bona fide seniority systems. In *American Tobacco Company* v. *Patterson,* 80-1199, the Court is considering the question whether immunity applies to those systems in existence when Title VII became effective. In *Pullman Standard* v. *Swint,* 80-1190 and *Steel Workers* v. *Swint,* 80-1193, this Court is considering a labor union's liability

on the question whether a 1941 seniority system was so tainted by race considerations as to preclude immunity under Title VII. The decision below involves the question of the bona fides of a seniority system one hundred years old.

Respondents have not disputed that this Court has never specifically ruled on a case of union liability under the applicable section of Title VII, 42 USC Sec. 2000e-2(c), which provides, "It shall be an unlawful employment practice for a labor organization to cause of attempt to cause an employer to discriminate". The record is an entirely stipulated record. The question presented is one of legal causation. The questions raised by the decision below are important and do present significant issues of federal law.

The Respondents claim that the decision of the Court below is consistent with this Court's ruling in *International Brotherhood of Teamsters* v. *United States,* 431 US 324 (1977) and *Griggs* v. *Duke Power Company,* 401 US 424 (1971). *Griggs* dealt with the question whether an employer can require a high school education or give an education test as a condition to employment which is not related to successful job performance; it is simply not on point. Further, the Respondent completely misconceives this Court's ruling in *Teamsters,* relying on a line of cases dealing with racial discrimination under the Railway Labor Act. There is no dispute that discriminatory acts are not immunized by the Railway Labor Act; this has nothing to do with the issues presented in this petition for writ of certiorari.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit, and the case should be remanded for reconsideration in light of *Burdine*, as this Court did in *Uncle Ben's, Inc.* v. *Johnson*, 101 S.Ct. 1967, 68 LEd2d 290 (1981), No. 80-1420.

Respectfully submitted,

WILLIAM SITZER
J. DENNIS O'LEARY
Of Counsel
Dubail, Judge, Kilker,
O'Leary & Smith
One Mercantile Center
Suite 3210
St. Louis, Missouri 63101
314/241-4261

October 29, 1981